U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-11A
Sec. 401(b)

FEB 23 1983

Mr. Paul S. Berger
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: Husky Oil Company
Identification Number: F-2552A

Dear Mr. Berger:

This is in response to your letter of December 7, 1982, requesting an advisory opinion that the prohibited transaction provisions of sections 406 and 407 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1954 (the Code) will not apply to certain transactions involving the Husky Oil Company (Husky), the Employees' Retirement Plan of Husky Oil Company (Retirement Plan), and the Employees' Pension Plan of Husky Oil Company (Pension Plan).

You represent that on January 1, 1949, Husky established the Employees' Retirement Plan of Husky Oil Company, the predecessor of the current plans. In 1970, Husky arranged financing for sixteen service station properties through a sale/leaseback transaction. For purposes of this transaction, HYO Corporation was incorporated in 1970 by Smith, Barney & Co., Incorporated (Smith, Barney), who retained all of the issued shares. Husky then sold the sixteen service stations to HYO, which raised money for the purchase by issuing notes. As part of the transaction, the properties were leased back to Husky. Husky was granted an option to purchase the leased properties at any time by paying a lump sum equal to the total amount required to retire HYO's notes.

As part of the 1970 transaction, Smith, Barney also granted to the predecessor plan an irrevocable option to purchase all of the stock of HYO for $1,000 or the book net worth of HYO at the time of exercise, whichever is greater.

In 1972, Husky arranged financing for an additional fourteen service stations in a second sale/leaseback transaction. HYEX Corporation was formed for purposes of this transaction. The terms of the lease and the option arrangements in favor of Husky and the predecessor plan were identical to those of the HYO transaction.

On January 1, 1973, for reasons unrelated to the sale/leaseback transactions, the predecessor plan was divided into the Retirement Plan and the Pension Plan. An undivided interest in the option rights was retained by each plan, and the options are now exercisable jointly.

Husky proposes to exercise its option to purchase the service station properties from HYO and HYEX at the option price contained in the pre-ERISA leases.

In effect, you request an advisory opinion that the stock and underlying service station properties of HYO and HYEX Corporations are not plan assets of the Retirement Plan and the Pension Plan or, in the alternative, that the exercise of the option by Husky is exempt from the restrictions of section 406 and 407(a) of ERISA by reason of the transitional rules contained in section 414(c) of ERISA.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

It is the opinion of the Department that the stock and underlying assets of HYO and HYEX are not plan assets for purposes of Part 4 of Title I of ERISA. When the predecessor plan was granted an option to purchase stock of these corporations, its assets were (and the assets of its successor plans are) the rights embodied in the option agreement, but do not include any underlying property which may be acquired at some future time pursuant to the exercise of the option.

In view of the above, we find it unnecessary to render an opinion on the additional issues you raise under section 414(c) of ERISA.

Finally, we wish to note that any investment decision relating to the exercise or nonexercise of the Plans' options would be subject to the general fiduciary responsibility provisions of section 404(a) of ERISA. Specifically, all decisions affecting the Plans' rights under the options must be made solely in the interest of participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man would use in the conduct of an enterprise of a like character and with like aims.

This letter is an advisory opinion under ERISA Proc. 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs