

### § 301.6104(a)-4

### 26 CFR Ch. I (4-1-01 Edition)

a letter to an employer which concludes that an employee's plan is not qualified and the related trust is not tax exempt will be open to public inspection. However, that same letter may also assert an income tax deficiency because employer contributions to the trust are, therefore, not deductible. In such a case, that part of the letter relating to the tax deficiency will be deleted before the letter is opened to public inspection.

(e) *Letters or documents issued with respect to tax return examination.* In the case of an examination of a taxpayer's return or consideration of a taxpayer's claim for credit or refund, no letter or document issued to the taxpayer before the preliminary or "30-day" letter described in § 601.105(d)(1) is issued to the taxpayer will be open to public inspection under section 6104(a)(1)(B)(iv) and this section. The "30-day" letter and any statutory notice of deficiency subsequently issued to the taxpayer under section 6212 will be open to public inspection to the extent provided in paragraph (d) of this section. If any letter or document other than a statutory notice of deficiency is issued to the taxpayer after the "30-day" letter is issued, such letter or document will be open to inspection to the extent provided in paragraph (d) of this section only if it finally resolves or otherwise disposes of a plan qualification or tax exemption issue raised in the "30-day" letter.

(f) *Letters or documents issued after September 2, 1974.* Section 6104(a)(1)(B)(iv) and this section apply to letters or documents issued by the Internal Revenue Service after September 2, 1974, even though the relevant application for a determination letter or other initiating correspondence from the applicant was filed with the Internal Revenue Service before September 2, 1974.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[47 FR 7845, 47 FR 50487, Nov. 8, 1982]

### § 301.6104(a)-4 Requirement for 26 or more plan participants.

(a) *Inspection by plan participants.* In the case of a plan, annuity or account

described in § 301.6104(a)-2(b) and § 301.6104(a)-3(a) that has fewer than 26 participants, material described in §§ 301.6104(a)-2 and 301.6104(a)-3 as open to public inspection is only open to inspection by a plan participant or the participant's authorized representative. This limitation does not apply, however, with respect to documents which an applicant files with respect to a request for approval of a master, prototype, pattern or other such plan (see § 301.6104 (a)-2 (b)(3)) or to opinion, notification or other such letters issued by the Internal Revenue Service with respect to such plans (see § 301.6104 (a)-3 (a)(3)).

(b) *Determining number of plan participants—(1) In general.* For purposes of determining whether a plan has fewer than 26 participants, the number of plan participants will be the number indicated on the most recent annual return filed for the plan under section 6058. Where an annual return indicates the number of participants both at the beginning and end of the plan year, the number indicated on the return means the number at the end of the plan year. If no annual return has been filed for the plan, then the number of plan participants will be the number indicated on the most recent application for a determination letter filed for the plan. If, however, the number of plan participants is increased prior to final Internal Revenue Service action on the application, the number of plan participants will be that increased number.

(2) *Decreasing number of plan participants.* If a plan having 26 or more participants, as indicated on an annual return or application for a determination letter, subsequently files an annual return indicating fewer than 26 plan participants, then material relating to the plan which is issued or received by the Internal Revenue Service after the date the annual return is filed will be open to inspection only by plan participants or their authorized representatives. Similarly, if a plan having 26 or more participants as indicated on an annual return or an application for a determination letter, subsequently files an application for a determination letter which indicates fewer than 26 plan participants, then that application and related material, as well as any other

material relating to the plan which is received or issued by the Internal Revenue Service after the date of receipt of that application, will be open to inspection only by plan participants or their authorized representatives. In either case, material open to public inspection pursuant to the number of plan participants indicated on previous annual returns or applications for a determination letter will remain open to public inspection.

(3) *Increasing number of plan participants.* If a plan having fewer than 26 plan participants, as indicated on an annual return or application for a determination letter, files a subsequent return or application indicating 26 or more plan participants, all the plan's prior applications and other material received or issued by the Internal Revenue Service after September 2, 1974, will be open to public inspection regardless of the number of plan participants indicated on any prior return or application.

(c) *Plan participant.* Solely for purposes of determining who is a plan participant permitted to inspect material relating to a plan having fewer than 26 participants, the term "plan participant" includes, but is not limited to, former employees (such as certain retired and terminated employees) who have a nonforfeitable right to benefits under the plan. An individual who is merely a beneficiary of an employee or former employee is not a plan participant, unless the individual is a beneficiary of a deceased former employee and is receiving benefits or entitled to receive future benefits under the plan. The term "plan participant" also includes the administrator, executor, or trustee of the estate of a deceased plan participant if such administrator, executor, or trustee is receiving benefits or entitled to receive future benefits under the plan in his or her official capacity. That material may be available for inspection to an individual under this paragraph does not constitute a determination by the Internal Revenue Service that the individual is a plan participant for any purpose other than inspection under section 6104(a)(1)(B).

(d) *Authorized representative.* "Authorized representative" means the representative of a plan participant des-

ignated by the participant in writing to inspect material described in §§ 301.6104(a)-2 and 301.6104(a)-3. The document designating the authorized representative must be signed by the plan participant and must specify that the representative is authorized to inspect the material. The document, or a copy, must be filed with the office of the Internal Revenue Service in which the authorized representative is to inspect the material. A copy which is reproduced by a photographic process need not be certified as a true and correct copy of the original.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50488, Nov. 8, 1982]

#### **§ 301.6104(a)-5 Withholding of certain information from public inspection.**

(a) *Tax exempt organizations—(1) Trade secrets, patents, processes, styles of work, or apparatus.* An organization whose application for tax exemption is open to public inspection under section 6104(a)(1)(A) and § 301.6104(a)-1 may in writing request the withholding of information contained in the application or supporting documents which relates to any trade secret, patent, process, style of work, or apparatus of the organization. The information will be withheld from public inspection if the Commissioner determines that the disclosure of such information would adversely affect the organization. Requests for withholding information from public inspection should be filed with the office with which the organization files the documents containing the information. The request must clearly identify the material desired to be withheld (the document, page, paragraph, and line) and must state why the information should not be open to public inspection. The organization will be notified of the Commissioner's determination as to whether the information will be withheld from public inspection. If the Commissioner determines that the information will be disclosed, the organization will be given 15 days after notification of the Commissioner's decision to contest that decision before the document is disclosed.