JOURNAL of PENSION BENEFITS

Issues in Administration, Design, Funding, and Compliance
Volume 27 • Number 4 • Summer 2020

Legal Developments

IRS Reminds Us—Keep a Copy of Your Executed Plan Document

Plan sponsors should be ever diligent in maintaining signed plan documents, as plan disqualification is on the line.

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The Internal Revenue Service (IRS) Office of Chief Counsel released a memorandum on December 13, 2019 (the Memo), reminding plan sponsors of the importance of retaining a validly executed plan document. A summary of the memo is set forth below, which focuses on a decision by the Tax Court in *Val Lanes Recreation Center v. Comm'r* [TC Memo 2018-92], where the court held that the IRS abused its discretion by revoking the tax qualification of the plan. Key takeaways follow, but the bottom line is: Keep a copy of the signed plan documents.

Facts

Val Lanes involved a plan sponsor that did not provide a signed copy of the plan document to the IRS; rather, the employer only had an unsigned plan document. This resulted in the IRS disqualifying the plan. The plan sponsor challenged this outcome in the Tax

Court. The Court found that there was creditable evidence that the restated plan and amendments were, in fact, adopted, even though the signed documents were never produced. Notably, the Court based its decision in part on the credible explanation as to the absence of executed copies in the record. Specifically, the Court noted that the flooding of the employer's premises and the seizure of the accountant's computers by the Department of Labor (DOL) and the IRS in a separate matter supported the credibility that it was uncertain whether the purported administrative record contained all documents related to the petitioner.

Law

The Memo outlines the applicable law as follows:

The existence of a written plan document that is communicated to the employees is a core requirement for determining the qualification of a plan, a proposition for which the Memo cites Treasury Regulation Section 1.401-1(a)(2). Also citing the Employee Retirement Income Security Act (ERISA) legislative history, the Memo states, "[a] written plan is to be required in order that every employee may, in examining the plan documents, determine exactly what his rights and obligation are under the plan."

In order for a qualified plan to be validly adopted, the plan document needs to be signed by the employer or someone authorized by the employer to sign the document. The Memo cites *Fazi v. Comm'r* [102 T.C. 695 (1994)], in which an employer with a Section 401(a) prototype plan failed to execute the prototype plan as amended, and the Tax Court held the plan disqualified, despite the stipulation that the plan satisfied these requirements operationally. The Tax Court stated that, "an unsigned and unadopted pension plan would not meet the letter or spirit of Section 401 and the underlying regulations." Moreover, a "definite written program and arrangement which is communicated to the employees" has no meaning if the employer lacks a written plan that is available and under which the employer is contractually obligated or committed.

Regarding retention, the Memo cites Code Section 6001, which requires that "[e]very person liable for any tax imposed by this Title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary may from time to time prescribe." It also cites the Regulations thereto [Treas. Reg. §1.6001-1(e)], which provide that the books or records required shall be kept at all times available for inspection by authorized internal revenue officers or employees, and retained so long as the contents may become material in the administration of any internal revenue laws.

Accordingly, the Memo provides that a signed copy of the plan document needs to be retained by the employer or its authorized agents.

Analysis

The Tax Court in *Val Lanes* made a factual determination that, although the employer was only able to produce an unsigned copy of its restated plan on audit, a plan document was validly signed and retained. This determination was primarily based on what the Tax Court considered to be credible testimony by the employer and his accountant.

The individual who served as the president, treasurer, and sole director of the employer testified that, under normal office procedures, he would have signed the plan document, because he signed every document sent by his accountant. He also testified that the failure of the roof on his facility resulted in extensive water damage "including to documents" related to the employer.

The accountant testified that, to the best of his knowledge, the restated plan was signed shortly after receipt of the favorable determination letter and that the employer retained the originals.

The Tax Court concluded that, "[g]iven the existence of the previously approved restated plan document and amendments and the credible explanation as to the absence of executed copies in the record, the Court finds the petitioner has established that it adopted the amendments … upon receiving the [favorable determination letter]."

IRS Take

The Memo explains that concerns have been raised that plan sponsors may argue that *Val Lanes* supports the proposition that a taxpayer may attempt to meet its burden to have an executed plan document based on the production of an unsigned plan and a pattern and practice of signing documents given by an advisor. The IRS makes it clear that this is not the case. It expressly states that the highly factual *Val Lanes* decision does not stand for this proposition. Rather, the taxpayer bears the burden of proof that it executed the document, which is ordinarily met by producing the signed document.

The IRS explains that the *Val Lanes* decision was based on very unusual facts that included flood damage of the employer's premises that resulted in water damage and loss of documents, as well as credible

evidence found by the Tax Court that the restated plan was signed and that the taxpayer retained the original based on testimony of the employer and his advisor. Therefore, *Val Lanes* should be limited to its specific and unique facts. In normal circumstances, it is unlikely that a taxpayer could meet its burden of proof that a plan document had been executed without providing a copy of the signed document.

The bottom line is: The IRS takes the position that "it is appropriate for IRS exam agents and others to pursue plan disqualification if a signed plan document cannot be produced by the taxpayer."

Conclusion

Plan sponsors should be ever diligent in maintaining signed plan documents, as plan disqualification is on the line. Notably, the Memo does not dwell on how the "signature" was executed (wet, electronic, or otherwise), or how the document was signed (*e.g.*, separate Board resolution or otherwise). Furthermore, if a plan sponsor is concerned about compliance with this requirement because a signed document cannot be located, a voluntary correction program (VCP) submission under Revenue Procedure 2019-19 should be seriously considered. ■