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Memorandum

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subject: Qualified Plan Adoption Requirements

This Generic Legal Advice Memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

In light of *Val Lanes*, must a plan sponsor retain a validly executed plan document?

CONCLUSION

A plan is considered adopted only if proof of adoption of the plan is provided. A validly executed plan document should be retained and upon audit given to the exam agent to support the qualified status of the plan. Upon failure to produce an executed plan, the employer has the burden to prove that it executed a plan document as required.

FACTS

In *Val Lanes Recreation Center v. Commissioner, TC Memo 2018-92,* the Tax Court found that the Internal Revenue Service abused its discretion by revoking the section 401(a) qualification of the employer's plan. This revocation was based primarily on the employer's inability to produce a signed copy of the plan as restated to include certain required provisions under section 401(a). A hearing was held where the Court made factual findings beyond the administrative record. The court found that despite the lack of a signed restated plan in the record there was credible evidence that the restated plan and amendments were adopted. Id. at 25. The court based its decision in part on the "the credible explanation as to the absence of executed copies in the record." The court noted the flooding of the employer's premises and the seizure of the accountant's computers by the Department of Labor and the Internal Revenue Service in a separate matter supported the credibility that it was uncertain whether the "purported administrative record contained all documents related to the petitioner." Id. at 25.

LAW AND ANALYSIS

In order for a qualified plan to be validly adopted, the plan document needs to be signed by the employer or someone authorized to by the employer to sign the document. In *Fazi v. Commissioner, 102 T.C. 695 (1994)*, an employer with a section 401(a) prototype plan failed to execute the prototype plan as amended to meet the TEFRA, DEFRA and REA requirements. Despite a stipulation that the plan satisfied these requirements operationally, the Tax Court found the plan to be disqualified. 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." Id. at 704. The Tax Court further stated that the requirement for a "definite written program and arrangement which is communicated to the employees" has no meaning if the employer lacks a written plan which is available and under which the employer is contractually obligated or committed. Id. at 704.

The existence of a written plan document which is communicated to the employees is a core requirement for determining the qualification of a plan. See Treas. Reg. § 1.401-1(a)(2). "A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligation are under the plan." ERISA, Conf. Rept. 93-1280 (1974), 1974-3 C.B. 415, 458.

A signed copy of the plan document needs to be retained by the employer or its authorized agents. Section 6001 requires that "Every person liable for any tax imposed by this Title, of 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."

Treas. Reg. § 1.6001-1(e) (Retention of Records) provides that the books or records required by this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

In *Val Lanes*, the Tax Court 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 credible testimony of the employer. 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 court found this testimony credible. His accountant testified that "to the best his knowledge, the restated plan amendments were signed shortly after receipt of the [favorable determination letter] and that petitioner retained the originals." *Val Lanes, TC Memo 2018-93 at 24-25.*

The failure of the employer to retain the plan document, as required under section 6001 is addressed by the Tax Court. The Court indicated 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]." Id at 25.

Concerns have been raised that Taxpayers may argue that *Val Lanes* supports the proposition that a taxpayer may attempt to meet the taxpayer's 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. However, 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.

In the very unusual facts of *Val Lanes*, which included flood damage of the employer's premises that resulted in water damage and loss of documents, the court found credible evidence that the restated plan was signed and the taxpayer retained the original based on testimony of the employer and its accountant. Since, 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 signed document and the decision in *Val Lanes* should be limited to its specific facts, it is appropriate for IRS exam agents and others to pursue plan disqualification if a signed plan document cannot be produced by the taxpayer.

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