

Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter Archive Message #675

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Subject: Mary Vandenack on Trimmer v. Commissioner - Tax Court Allows Hardship Exception to 60-Day Rollover Requirement

“In the Trimmer case, the taxpayers sought a hardship exception to the 60-day rollover requirement for retirement plan distributions. John Trimmer received two retirement plan distributions in 2011, following his retirement from the New York Police Department. The distributions were received at a time when Mr. Trimmer was suffering from major depressive disorder. Mr. Trimmer ultimately deposited the funds (which were not used in the interim) into IRAs but did not do so within 60 days. The Internal Revenue Service denied taxpayers’ request for a hardship waiver and determined a deficiency. Taxpayers sought relief from the Tax Court. The Tax Court ruled that based on the facts and circumstances of the case, it would be “against equity or good conscience” to deny the Trimmer’s request for a hardship waiver.

This ruling opens the door for practitioners to argue that a hardship waiver can be provided during examination by the Internal Revenue Service for distributions made since the issuance of Rev. Proc. 2003-16. Additionally, the Tax Court showed its willingness to conclude in favor of a taxpayer where it can be shown that the Internal Revenue Service made a denial without giving full consideration to facts and circumstances.”

Mary Vandenack provides members with important commentary on [Trimmer v. Commissioner](#).

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly-regarded practitioner in the areas of tax, high net worth estate planning, asset protection planning, benefits, executive compensation, business succession planning, tax dispute resolution, and tax-exempt entities. Mary’s practice serves businesses and business owners, executives, real estate developers and

investors, health care providers and tax exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force and a member of the American Bar Association Law Practice Division where she serves on the TechShow Board and the Law Practice Magazine Board. Mary is also a member of the American Bar Association Sections on Taxation and Business. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on law practice related topics including improving the delivery of legal services, technology in the practice of law, building sustainable law firms, and alternative fee structures.

Now, here is Mary's commentary:

EXECUTIVE SUMMARY:

In the Trimmer case, the taxpayers sought a hardship exception to the 60-day rollover requirement for retirement plan distributions. John Trimmer received two retirement plan distributions in 2011, following his retirement from the New York Police Department. The distributions were received at a time when Mr. Trimmer was suffering from major depressive disorder. Mr. Trimmer ultimately deposited the funds (which were not used in the interim) into IRAs but did not do so within 60 days. The Internal Revenue Service denied taxpayers' request for a hardship waiver and determined a deficiency. Taxpayers sought relief from the Tax Court. The Tax Court ruled that based on the facts and circumstances of the case, it would be "against equity or good conscience" to deny the Trimmer's request for a hardship waiver. In making its ruling, the Tax Court also ruled that the Internal Revenue Service Examination Division had the authority to consider a waiver under I.R.C. §402(c)(3)(A) and that the Internal Revenue Service denial of such waiver was subject to judicial review.

FACTS:

John Trimmer served as a police officer for the New York Police Department for a period of 20 years prior to his retirement. Mr. Trimmer retired in April, 2011 at the age of 47. Shortly after retiring, Mr. Trimmer began to suffer from major depressive disorder. Mr. Trimmer's symptoms

included irritability, anti-social tendencies, loss of interest in normal activities, neglect of basic hygiene, weight loss, and sleeplessness.

As a result of Mr. Trimmer's employment with the New York Police Department, Mr. Trimmer had retirement accounts with the New York City Employees' Retirement System as well as the New York City Police Pension Fund. On May 27, 2011 and June 10, 2011, Mr. Trimmer received distribution checks from the retirement plans. Mr. Trimmer received checks for \$99,990 and \$1,680. Both checks were received after Mr. Trimmer's depression had set in.

Mr. Trimmer did not immediately deposit the checks but rather left them lying on a dresser at home. On July 5, 2011, the checks were deposited into a checking account that was jointly owned by Mr. Trimmer and his spouse. The Trimmers did not spend any of the funds before ultimately depositing them into an IRA account.

In early 2012, Mr. Trimmer received 1099-Rs reflecting the distributions. The 1099-Rs reflected the distributions as taxable in Box 2a and as subject to the penalty for early withdrawal of distributions prior to age 59 ½, with no known exception.

Mr. Trimmer consulted with the regular tax return preparer for the Trimmers. The tax return preparer suggested depositing the funds in an IRA. Mr. Trimmer did so on April 16, 2012. The Trimmers' 2011 tax return was filed reflecting the retirement plan distributions as non-taxable.

The Internal Revenue Service issued a Notice CP2000 to the Trimmers on December 16, 2013. Such notice proposed changes to the Trimmers' 2011 tax returns that would both include the distributions as taxable income and impose an additional 10% tax for premature distributions. The Notice CP2000 indicated that the Trimmers would owe \$39,963 in additional taxes.

Mr. Trimmer replied to the notice on April 30, 2014, with a letter explaining that he was suffering from depression at the time he received the distributions. The letter asked that the Internal Revenue Service to consider the facts and arrive at a fair decision to waive the proposed tax and penalties on the retirement plan distributions.

By letter of June 6, 2014, the Internal Revenue Service denied Mr. Trimmer's request for relief. The letter stated "The law requires you to roll over your distribution within 60 days of the distribution date. If the roll over exceeds the time frame it becomes fully taxable." The letter failed to mention the possibility of, or procedure for requesting a hardship waiver.

The Tax Court, among other holdings, held as follows:

1. The Tax Court has jurisdiction in a deficiency proceeding to review an Internal Revenue Service denial of a request for waiver of the 60-day rollover requirement.
2. "On the facts and circumstances of this case, it would be 'against equity or good conscience' within the meaning of I.R.C. sec. 402(c)(3)(B), to deny the Petitioner's request for a hardship waiver." The two distributions are excluded from income."

The Internal Revenue Service argued that the hardship waiver provisions of I.R.C. §402(c)(3)(B) were inapplicable because Mr. Trimmer's letter in response to the CP2000 was not the correct way to seek a hardship waiver pursuant to Rev. Proc. 2003-16, 2002-1 CB 359. The Trimmers should have requested a private letter ruling and paid the required user fee to do so. The Internal Revenue Service took the position that it did not have the ability to grant a hardship waiver during the examination process. The Tax Court concluded that Rev. Proc. 2016-47, 2016-37 I.R.B. at 346, modified Rev. Proc. 2003-16 to make it clear that the Internal Revenue Service did have the authority to grant waivers during the exam process. The Tax Court also concluded that a denial of a hardship waiver is subject to judicial review.

COMMENT:

I.R.C. §402(a) provides that "any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72...."

I.R.C. §402(c)(1) provides that a distribution shall not be includible in gross income if the distribution is rolled over to a qualified retirement plan in an eligible rollover distribution.

I.R.C. §402(c)(3)(A) specifies that a rollover distribution must be made within 60 days following the day on which the distributee received the property distributed.

I.R.C. §402(c)(3)(B) provides a hardship exception to the 60-day rollover rule: “The Secretary may waive the 60-day requirement under subparagraph (A) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.”

Rev Proc. 2003-16, 2003-1 C.B. 359, section 3.01 states that “a taxpayer must apply for a hardship exception to the 60-day rollover requirement using the same procedure as outlined in Rev. Proc. 2003-4 for letter rulings, accompanied by the user fee set forth in Rev. Proc 2003-8.” This Rev. Proc. also elaborates on when the Internal Revenue Service will issue a ruling waiving the 60-day rollover requirement by providing a list of objective factors. The factors include: “(1) errors committed by a financial institution; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error; (3) the use of the amount distributed ...; and (4) the time elapsed since the distribution occurred.”

Rev. Proc. 2016-47, 2016-37 IRB 346 provides guidance regarding waivers of the 60-day rollover requirement. The Rev. Proc. provides a self-certification procedure that taxpayers may use in claiming eligibility for a waiver of the 60-day requirement with respect to a rollover. Rev. Proc. 2016-47 also states that it “modifies Rev. Proc. 2003-16, 2004-4 I.R.B. 359, by providing that the Internal Revenue Service may grant a waiver during an examination of the taxpayer’s income tax return.”

In this case, the Internal Revenue Service argued that hardship waivers could only be sought in accordance with the procedures specified in Rev. Proc. 2003-16 and that because Rev. Proc. 2016-47 had an effective date after the facts of the Trimmer case had occurred, any modification to the rules resulting from the later Rev. Proc. did not apply to the Trimmer case. The Tax Court noted that Rev. Proc. 2003-16 had been structured in a way that identified two separate purposes. The first purpose was to create a self-certification process. The second was to amend Rev. Proc. 2003-16 to

clarify that the Internal Revenue Service could grant a waiver during examination. The Tax Court concluded that the effect of the language concerning the amendment of Rev. Proc. 2003-16 was to make it clear that the Internal Revenue Service has had the authority to grant waivers during the exam process at least since January 27, 2003, when Rev. Proc. 2003-16 was first issued.”

The Tax Court also concluded that the Court had the authority to review the denial of the hardship waiver. The Court noted that “it is well established that this Court’s deficiency jurisdiction includes reviewing administrative determinations that are necessary to determine the merits of deficiency determinations.” The Tax Court determined that the standard of review was to determine whether the Internal Revenue Service had abused its discretionary authority. The Court stated that such a conclusion was easy in this case given the lack of consideration given to the facts and circumstances of the Trimmers’ request.

The Court spent significant time addressing the meaning of “against equity and good conscience.” In deciding in favor of the Trimmers, the Court concluded that “we should construe ‘equity or good conscience’ to reflect a broad and flexible concept of fairness....”

This ruling opens the door for practitioners to argue that a hardship waiver can be provided during examination by the Internal Revenue Service for distributions made since the issuance of Rev. Proc. 2003-16. Additionally, the Tax Court showed its willingness to conclude in favor of a taxpayer where it can be shown that the Internal Revenue Service made a denial without giving full consideration to facts and circumstances.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

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§402(c)(1); I.R.C. §402(c)(3)(A); I.R.C. §402(c)(3)(B); Rev Proc. 2003-16.