
**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

vs.

**AMERICAN PENSION SERVICES, INC.,
a Utah corporation, and CURTIS L.
DeYOUNG, an individual,**

Defendants.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
RECEIVER'S MOTION FOR ORDER
REQUIRING ALL REMAINING
AMERICAN PENSION SERVICES,
INC. ACCOUNT HOLDERS TO
TRANSFER ACCOUNTS TO EQUITY
TRUST WITHIN THIRTY DAYS, AND
AUTHORIZING THE RECEIVER TO
EXERCISE ALL RIGHTS TO
COLLECT LOSS ALLOCATION
PAYMENTS UNDER THE
LIQUIDATION PLAN**

Case No.: 2:14-CV-00309-RJS-DBP

Judge Robert J. Shelby

Magistrate Judge Dustin B. Pead

Before the court is the Motion for Order Requiring all Remaining American Pension Services, Inc. (APS) Account Holders to Transfer Accounts to Equity Trust Company Within Thirty Days, and Authorizing Receiver to Exercise All Rights to Collect Loss Allocation Payments under the Liquidation Plan (Dkt. 567) filed by Diane Thompson, the court-appointed Receiver of American Pension Services, Inc. The Motion is unopposed. The court concludes the Motion should be granted, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On February 27, 2015, the court approved the Amended Modified Plan of Liquidation (Liquidation Plan). (Dkt. 458, Order Approving Liquidation Plan.)

2. Also on February 27, 2015, the court approved Equity Trust Company (Equity Trust) as the successor administrator/custodian for APS client accounts. (Dkt. 457, Order Granting Receiver's Motion to Approve Successor Custodian/Administrator.)

3. The Liquidation Plan provides that the approximately \$25 million loss in the total value of the APS IRA account holders' assets shall be divided among the accounts on a pro rata basis, resulting in an approximate loss of ten percent (10%) to each account. (Liquidation Plan at p. 33.) This loss allocation applies “[w]hether an APS client has only cash assets, non-cash assets or both, they are similarly and equally situated This means a fair and equitable [Liquidation Plan] requires an APS client whose investments are solely non-cash to nonetheless liquidate those non-cash investments or otherwise contribute cash to cover the proportionate share of the shortfall.” (*Id.*)

4. The Receiver recognized that IRA account holders without sufficient cash to meet the ten percent (10%) cash allocation requirement may need to liquidate or borrow against assets within their IRA or 401(k) account, which may have tax consequences. (*Id.* at 34.)

5. As the IRS is responsible for determining the taxability of IRA-related and 401(k)-related transactions, the Receiver filed a request for a Private Letter Ruling on October 3, 2014 (PLR Request). (*Id.*)

6. The Receiver sought an expedited ruling on behalf of IRA account holders. (*Id.* at 40.)

7. The PLR Request sought confirmation of tax-neutral treatment for IRA account holders.

8. The Receiver asked for a ruling that would permit APS account holders to make

restorative payments (either through cash in their APS accounts or through a separate contribution) in order to cover the loss allocation.

9. Specifically, the Receiver has asked that payments or future reimbursements:
 - a. be considered a “restorative payment”;
 - b. not be considered a contribution to the 401(k) or IRA account;
 - c. not be considered a distribution from the 401(k) or IRA;
 - d. not be subject to additional excise taxes imposed by the Internal Revenue Code; and
 - e. not be reported as income on a Form W-2, Form 5498, or Form 1099-R.

10. Pursuant to the Liquidation Plan, APS account holders directly impacted by the PLR Request (i.e. account holders with solely non-cash assets) could defer submitting a direction letter to transfer Equity Trust until a response on the PLR Request was received. (Liquidation Plan at p. 41.) The Receiver requested that all clients electing such a deferral provide a notice to the Receiver.

11. The Plan provides that after a PLR, if any, is received, APS account holders must pay the loss allocation and any management fees due and owing, and submit a direction letter to transfer their account within 30 days. (*Id.*)

12. Under the Liquidation Plan, “[s]hould the IRS decline to issue a PLR, the Receiver will devise an alternative approach to propose to the court.” (*Id.*)

13. The Receiver was given “wide latitude in exercising her discretion in determining how to implement the Liquidation Plan.” (*Id.* at 51.)

14. After a number of conversations with IRS representatives, the Receiver and her tax attorneys attended a conference with the Internal Revenue Service (IRS) on April 28, 2015 in

Washington D.C. to discuss the Receiver's PLR Request.

15. During the conference, the IRS representatives informed the Receiver and her counsel that the IRS was not inclined to issue a PLR for procedural reasons and that it would issue an official letter to the Receiver with its final decision shortly.

16. The IRS representatives identified two specific procedural reasons on which the decision was based.

- a. First, in the IRS's view, all 5,500 of the APS account holders ultimately would seek to rely on the ruling and, procedurally, a private letter ruling may only be relied upon by the individual taxpayer to whom it applies.
- b. Second, even though there is authority to support the rulings sought in the PLR Request, the PLR still requested that the IRS change a position announced in a prior private letter ruling based, in part, on subsequently issued guidance. Thus, the IRS representatives indicated that a new revenue ruling would be the appropriate method of announcing a change in its position.

17. On July 2, 2015, the Receiver received the IRS's official response to the PLR Request (the No Rule decision). Relying on Section 6.09 of Revenue Procedure 2015-1, the IRS declined to issue a letter ruling on the basis that the issues presented "cannot be readily resolved before a regulation or any other published guidance is issued." (*Id.*, ¶ 2.)

18. The No Rule decision has left the Receiver without specific IRS confirmation that adverse tax consequences will not result if APS account holders comply with the Liquidation Plan.

19. The other means through which the Receiver may obtain specific IRS

confirmation cannot be accomplished without significant delay and cost which would further harm the account holders.

20. The Liquidation Plan provides that all provisions for the ten percent (10%) allocation and account transfers must occur no later December 31, 2015, thereby triggering the Receiver's required reporting obligations for the 2015 tax year.

21. The IRS representatives indicated during conferences with the Receiver and her counsel that, if the IRS decides to issue a revenue ruling applicable to the facts of this case, it would not do so until 2016 or later.

22. The IRS representatives also discussed with the Receiver and her counsel the possibility of a closing agreement under section 7121 of the Internal Revenue Code.

23. The IRS representatives advised that it would not be possible to negotiate and finalize a closing agreement before the end of 2015.

24. The Liquidation Plan's December 31, 2015 deadline and the resulting tax reporting obligations for the 2015 tax year foreclose the possibility of pursuing a closing agreement with the IRS.

25. The No Rule decision from the IRS only affects approximately 168 of APS account holders because, as of July 8, 2015, the Receiver has received notice from about 168 clients that they elect to defer transfer until the PLR guidance is received.

26. In addition to the limited number of APS account holders who elect to defer, there remain more than 2,100 account holders who have failed, refused or neglected to provide the Receiver a direction letter to transfer their account to Equity Trust in violation of the Liquidation Plan.

27. Pursuant to the Liquidation Plan, if an account holder fails to submit a direction letter within the required time frame, the Receiver may take certain action, including any of the following: (1) resign as administrator (no transfer to Equity Trust will be effected) and issue a 1099 IRS tax notice based on the recorded value of account assets of April 25, 2014; (2) impose a lien on APS account holder assets; (3) pursue collection from APS account holders who refuse to comply with the Liquidation Plan; and/or (4) liquidate assets sufficient to meet the loss allocation requirement (with any remaining funds transferred to Equity Trust on behalf of the account holder). (Liquidation Plan at p. 46.)

28. APS account holders were required to move to Equity Trust within ninety (90) days of the court's approval of the Liquidation Plan (or by May 30, 2015, which deadline was later extended to June 30, 2015). The only exception to this deadline was if an APS client provided notice that they were awaiting guidance on a PLR. (*Id.*)

29. As of July 8, 2015, approximately 1,800 former APS account holders have transferred to Equity Trust.

30. As of July 8, 2015, approximately 2,100 APS account holders have failed to transfer to Equity Trust.

31. As of July 8, 2015, only approximately 168 account holders have provided notice that they are deferring transfer until a response is received from the IRS on the PLR Request.

32. The financial impact to the success of the Liquidation Plan of the APS account holders who have failed, refused and neglected to comply with the Liquidation Plan is significant. The loss allocation amount associated with the accounts that have failed to transfer totals more than \$10,000,000.

33. The purpose of the Loss Allocation was to ensure a fair and equitable pro-rata apportionment of the losses caused by the misappropriation of approximately \$25 million. Otherwise, APS would have a cash shortfall upon the transfer of all accounts to Equity Trust. (*Id.*)

34. Without substantial and/or complete compliance by all APS account holders, the Receivership Estate will not recover the necessary funds to cover the misappropriation and assure the proportionality of the loss allocation.

35. Pursuant to the Liquidation Plan, the last day for an allocation payment is December 31, 2015. (Liquidation Plan at p. 45.) This deadline is only for clients who have notified the Receiver of their intent to liquidate account assets and have a legitimate basis for an extended deadline. (*Id.*)

CONCLUSIONS OF LAW

1. As the Receiver's request for a PLR from the IRS has been denied, the Receiver's proposed alternative method of not reporting a payment of cash outside the IRA account or liquidation of assets in order to pay the required loss allocation to the IRS as a contribution to, or distribution from, the individual accounts, is reasonable;

2. The Receiver's and her counsel's conclusions that such contributions and liquidations should be treated as tax neutral are valid and sufficient to require the transfer of all APS accounts to the successor Equity Trust Company; and

3. The APS account holders who have not transferred to Equity Trust Company while failing to provide the Receiver with notice of their election to defer transfer until PLR guidance was issued are in violation of the Liquidation Plan.

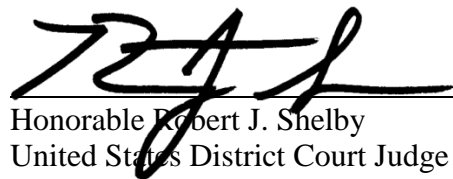
Based on the Motion and the court's findings of fact and conclusions of law, it is
HEREBY ORDERED THAT:

1. The Receiver's proposed alternative method for determining the potential tax consequences for APS account holders contributing outside funds or liquidating account assets to make a loss allocation payment is approved; and

2. All remaining APS clients must submit a direction letter to transfer to Equity Trust Company within thirty (30) days of notice of this Order. Notice shall be deemed provided following the posting of the Order on the Receivership website at www.apsreceiver.com or five (5) business days after mailing a copy of the Order to each client at the last known address via U.S. Mail, whichever is later. Any client who fails to transfer within the applicable time frame are subject to the Receiver's authority to secure loss allocation payments under the Liquidation Plan, including sweeping the accounts for cash to satisfy the loss allocation and/or liquidating assets.

DATED this 7th day of August 2015.

BY THE COURT:



Honorable Robert J. Shelby
United States District Court Judge