

**U.S. Department of Labor**

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**Issue Date: 24 April 2006**

Case No.: 2005-RIS-0099

In the Matter of:

U.S. DEPARTMENT OF LABOR,  
Claimant,

v.

CALLAGHAN & CALLAGHAN, INC.,  
Employer.

**DECISION AND ORDER**

This case arises under § 502(c)(2), 29 U.S.C. §1132(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). Complainant, U.S. Department of Labor, Employee Benefit Security Administration, (EBSA), assessed a penalty against Respondent, Plan Administrator of the Callaghan & Callaghan, Inc. 401(k) Profit Sharing Plan & Trust (Callaghan) for failure to include the report of an independent qualified public accountant (IQPA) as part of its 2003 Form 5500 Annual Report as required by ERISA § 502(c)(2) and the regulations at 29 C.F.R. § 2570.

A hearing was held in Greensboro, North Carolina, on April 6, 2006. Complainant Exhibits (CX) 1-9 and Respondent Exhibits (RX) 1-10 were admitted into evidence. Jose Irizarry Paraza and H. Leon Kirkman testified. Based on the record presented, I make the following Findings of Fact and Conclusions of Law under 29 C.F.R. § 2570.68.

**FINDINGS OF FACT**

1. Steven Callaghan is the plan administrator of the Callaghan & Callaghan, Inc. 401(k) Profit Sharing Plan & Trust. (Tr. 6).
2. Under ERISA, the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 120 days after the end of the plan year. Callaghan filed its 2003 report on July 30, 2004, the due date for the report. (Tr. 15; CX 1).
3. There was a deficient filing for the plan year 2003 in that the filing omitted the IQPA. On October 14, 2004, EBSA notified Callaghan of the deficiency. Callaghan forwarded the documents to its CPA. (Tr. 6, 84; RX 1).

4. Having received no reply, on December 8, 2004, EBSA again notified Callaghan of the deficiency and requested correction. (RX 2).
5. Having received no reply, on March 10, 2005, EBSA sent a Notice of Rejection to Callaghan. The notice states that a written response must be filed within 45 days to avoid potential civil penalties and that no extension will be granted. The response was therefore due on April 24, 2005. (CX 2; Tr. 17).
6. On April 19, 2005, Kenneth Fulp, a CPA hired by Callaghan, requested an extension until May 30, 2005, to allow adequate time to locate necessary items for the audit and to complete the audit. Fulp had been engaged on April 4, 2005, to conduct the audit (CXs 3, 8).
7. Some time after April 4, 2005, Fulp contacted an unidentified employee of EBSA who advised that an IQPA was not required. The record does not indicate what facts were provided to the employee or what position the employee held. There is no record of the contact between Fulp and the unidentified employee in the EBSA file or that EBSA was informed of this conversation prior to September 29, 2005. (Tr. 113; CX 8).
8. Yolanda Kirkman also contacted EBSA and spoke to Vanessa Jackson of the Office of the Chief Accountant of EBSA. Jackson told Ms. Kirkman that an IQPA was required. In early May 2005, Fulp spoke to Jackson who confirmed Fulp's understanding that an IQPA was required. (Tr. 27,87; CX 8).
9. Between April 21, 2005, and June 15, 2005, Callaghan attempted to complete the audit. (RX 3 -10).
10. On May 16, 2005, EBSA issued a Notice of Intent to Assess a Penalty in the amount of \$43,350.00 for the failure to file the IQPA. As per the regulations, the penalty was calculated as \$150 per diem for 289 days (August 1, 2004 to the date of the notice) = \$43,350. Callaghan was given 35 days to file a Statement of Reasonable Cause. (CX 4).
11. On June 17, 2005, Callaghan filed a Request for Waiver of Penalty Due to Reasonable Cause. Attached to the Request was the IQPA. The Request asserts Callaghan made every effort to comply and its failure to submit the IQPA was not willful to any degree, that there was some question regarding whether or not an IQPA was required as there were only three actual participants in the plan and that the delay prior to the March 10, 2004 Notice of Rejection was the result of miscommunication between Callaghan and the company CPA. (CX 5).
12. On July 5, 2005, EBSA issued a Notice of Determination on Statement of Reasonable Cause waiving 95% of the proposed penalty because Callaghan had filed an acceptable IQPA. EBSA determined there was no reasonable cause to waive \$2,167 (5%) of the intended penalty because reasonable cause was not presented for the failure to file an acceptable annual report as the original filing nor for the failure to timely correct. (CX 8; Tr. 32).

## DISCUSSION AND CONCLUSIONS OF LAW

Under ERISA, the administrator of an employee benefit plan is required to file an annual report within 210 days of the close of the plan year. The form and content of the annual report are set forth in ERISA § 103. Paragraph (a)(3) specifies the requirement for an annual audit of an employee benefit plan and the report or opinion thereon to be performed by an IQPA. The Parties agree that Callaghan was required to file an IQPA with its 2003 annual report.

ERISA provides for the imposition of penalties against a plan administrator for failure to file the required annual report. The regulations at 29 C.F.R. § 2560.502c-2 set forth the procedures governing the assessment of penalties and provides that all or part of a penalty may be waived upon a showing by the plan administrator that there was reasonable cause for the failure to file a proper annual report. The regulations for considering reasonable cause do not define the specific circumstances under which reasonable cause would exist and are sufficiently flexible to ensure that appropriate consideration is given to good faith and diligent efforts by the administrator to comply with the annual reporting requirements. Thus, the amount assessed under ERISA § 502(c)(2) is determined taking into consideration the degree of willfulness of the failure to file the annual report. 29 C.F.R. § 2560.502c-2(b)(1).

Generally, an administrative law judge will not disallow a penalty assessed by ESBA for failing to timely file an IQPA unless ESBA has acted in an arbitrary, capricious or unreasonable manner. *U.S. Dept. of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-62 (ALJ Mar. 29, 1995). I find that ESBA did not act in an arbitrary, capricious or unreasonable manner in determining to assess a 5% penalty in the amount of \$2,167.00 against Callaghan.

Several factors support this determination. First, there is no mention of any incorrect advice concerning whether an audit was required until Fulp's September 29, 2005 letter. This information was never provided to ESBA as part of the Statement of Reasonable Cause and up to that time the stated reasons for the delay were failed email contacts between Callaghan and its CPA and the difficulty with getting the necessary information. Second, there is no reasonable cause given for the failure to file an IQPA with the original filing or between July 31, 2004 and April 4, 2005, when Fulp was hired to do the IQPA. Although there may have been some internal miscommunications between Callaghan and its CPA, the December 2004 letter from ESBA should have put Callaghan on notice that something was amiss. As the plan administrator, it was Callaghan's responsibility to follow up with its CPA and insure that the IQPA was properly filed. Third, although Fulp may have been told that an audit was not required, the record is devoid of any of the facts that were provided to the unidentified ESBA employee and what position or authority that employee held. To the contrary, REs 8 – 10 indicate that Callaghan was proceeding with the understanding that an audit was required. What is clear is Fulp's understanding was that an audit was

required, that Kirkman was told by Jackson that an audit was required and that Callaghan was under proceeding as if an audit was required.

ERISA places the responsibility for accurate, complete and timely reporting on the plan administrator. Callaghan's failure to take steps to insure that the IQPA was properly filed does not demonstrate good faith or diligence in the performance of its responsibilities as plan administrator.

### **ORDER**

IT IS THEREFORE ORDERED that ESBA's determination to assess a penalty of \$2167.00 against Callaghan is AFFIRMED.

**A**

LARRY W. PRICE  
Administrative Law Judge

LWP/lpr  
Newport News, Virginia