



New Procedures for Processing Employment Tax Cases Involving Worker Classification and Section 530 of the Revenue Act of 1978 Under Section 7436 of the Code

Notice 98-43

PURPOSE

The Taxpayer Relief Act of 1997 (TRA '97), Pub. L. No. 105-34, 111 Stat. 788, created new § 7436 of the Internal Revenue Code (the "Code"), which provides Tax Court review rights concerning certain employment tax determinations. This notice provides information about how taxpayers may petition for Tax Court review of employment tax determinations under § 7436. Attached to this notice as Exhibit 1 is a "Notice of Determination Concerning Worker Classification Under Section 7436" (a "Notice of Determination"). With respect to taxpayers whose workers are the subject of an employment tax determination, the attached Notice of Determination addressed to a taxpayer will constitute the "determination" that is a prerequisite to invoking the Tax Court's jurisdiction under § 7436.

BACKGROUND

Section 7436(a) of the Code provides the Tax Court with jurisdiction to review determinations by the Service that workers are employees for purposes of subtitle C of the Code, or that the organization for which services are performed is not entitled to relief from employment taxes under § 530 of the Revenue Act of 1978. Section 7436(a) requires that the determination involve an actual controversy and that it be made as part of an examination. Section 7436 became effective on August 5, 1997.

Proceedings under § 7436 may be conducted pursuant to the Tax Court's simplified procedures for small tax cases set forth in § 7463 of the Code and Rule 295 of the Tax Court's Rules of Practice and Procedure. Currently, taxpayers may elect, with the concurrence of the Tax Court, to use these simplified procedures if the amount of employment taxes placed in dispute is \$50,000 or less for each calendar quarter involved.

ISSUES TO WHICH § 7436 APPLIES

Section 7436(a) provides the Tax Court with jurisdiction to review the Service's determinations that one or more individuals performing services for the taxpayer are employees of the taxpayer for purposes of subtitle C of the Code, or that the taxpayer is not entitled to relief under § 530 with respect to such individuals. Thus, § 7436(a) does not provide the Tax Court with jurisdiction to determine any amount of employment tax or penalties. Nor does § 7436(a) provide the Tax Court with jurisdiction to review other employment tax issues. Moreover, the procedures set forth in § 7436 do not apply to employment-related issues not arising under subtitle C, such as the classification of individuals with respect to pension plan coverage or the proper treatment of individual income tax deductions. Additionally, insofar as § 7436(a) only confers jurisdiction upon the Tax Court to review determinations that are made by the Service as part of an examination, other Service determinations that are not made as part of an examination, including those that are made in the context of private letter rulings or Forms SS-8, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding, are not subject to re-

view by the Tax Court under § 7436(a).

The Service will issue a Notice of Determination only after the Service has determined *both* that one or more individuals performing services for the taxpayer are employees for purposes of subtitle C and that the taxpayer is not entitled to relief under § 530. This will provide taxpayers with the opportunity to resolve both issues in one judicial determination.

TAXPAYERS ELIGIBLE TO SEEK JUDICIAL REVIEW

Section 7436(b) provides that a pleading seeking Tax Court review of the Service's determination may be filed only by "the person for whom the services are performed." Thus, workers may not seek review of the Service's determinations under § 7436. In addition, because there must be an actual controversy, review may not be sought by a third party that has not been determined by the Service to be the employer.

NOTICE OF DETERMINATION CONCERNING WORKER

CLASSIFICATION UNDER § 7436

The Service will inform taxpayers of a determination described in § 7436(a) by sending the taxpayer a Notice of Determination by certified or registered mail. A copy of the current Notice of Determination, which may be revised from time to time, is attached hereto as Exhibit 1.

The Notice of Determination will advise taxpayers of the opportunity to seek Tax Court review and provides information on how to do so. Attached to the Notice of Determination will be a schedule showing each kind of tax with its proposed employment tax adjustment by calendar quarter. The schedule will be provided to enable the taxpayer to determine eligibility to elect use of the small tax case procedures under § 7436(c). Currently, the small tax case procedures may be available under § 7436(c) if the amount of employment taxes placed in dispute is \$50,000 or less for each calendar quarter involved.

In most cases, a taxpayer who receives a Notice of Determination will have previously received a "thirty-day letter," which the Service sends to taxpayers in unagreed examination cases. The thirty-day letter lists the proposed employment tax adjustments to be made and describes

the taxpayer's right to either agree to the proposed employment tax adjustments or, alternatively, to protest the proposed adjustments to the Appeals Division of the Service within thirty days of the date of the letter. If the taxpayer does not respond to the thirty-day letter by agreeing to the proposed adjustments or, alternatively, by filing a protest with the Appeals Division, the taxpayer will receive, by certified or registered mail, a Notice of Determination. Under normal procedures, if the taxpayer does not respond to the thirty-day letter, the taxpayer should generally expect to receive a Notice of Determination within sixty days after expiration of the thirty-day period beginning with the date on the thirty-day letter. If no Notice of Determination is received during this period, the taxpayer may wish to contact the local Internal Revenue Service office to check on the status of the case.

If the taxpayer responds to the thirty-day letter by filing a protest with the Appeals Division (or if the case proceeds to Appeals by way of the employment tax early referral procedures, *see* Announcement 97-52, 1997-21 I.R.B. 22; Announcement 96-13, 1996-12 I.R.B. 33; and Rev. Proc. 96-9, 1996-1 C.B. 575), and the worker classification and § 530 issues are not settled on an agreed basis in the Appeals Division, the taxpayer will thereafter receive a Notice of Determination. Taxpayers are encouraged to resolve cases in nondocketed status by requesting use of the early referral procedures in appropriate cases.

PREREQUISITE FOR SEEKING TAX COURT REVIEW

Because a Notice of Determination constitutes the Service's determination described in § 7436(a), the Notice of Determination is a jurisdictional prerequisite for seeking Tax Court review of the Service's determinations regarding worker classification and § 530 issues. Tax Court proceedings seeking review of these determinations may not be commenced prior to the time the Service issues a Notice of Determination to the taxpayer.

TIME BY WHICH PETITION MUST BE FILED

Section 7436(b)(2) provides that a taxpayer's petition for review must be filed with the Tax Court before the 91st day

after the Service mails its Notice of Determination to the taxpayer by certified or registered mail. If the taxpayer discusses the case with the Service during the period before the 91st day following the mailing of the Notice of Determination, the discussion will not extend the period in which the taxpayer may file a petition with the Tax Court.

A taxpayer who does not file a Tax Court petition within the allotted time retains the right to seek judicial review of the Service's employment tax determinations by paying the tax and filing a claim for refund, as required by § 7422(a) of the Code. If the claim for refund is denied, the taxpayer may file a refund suit in district court or the Court of Federal Claims.

APPEALS JURISDICTION

Cases docketed in the United States Tax Court will be referred by District Counsel to the Appeals Division for consideration of settlement unless the Notice of Determination was issued by Appeals. Cases in which Appeals issued such a Notice of Determination may be referred to Appeals unless District Counsel determines that there is little likelihood that a settlement of all or a part of the case can be achieved in a reasonable period of time. Appeals will have sole settlement authority over docketed cases referred to Appeals until the case is returned to District Counsel. *See* Rev. Proc. 87-24, 1987-1 C.B. 720.

SUSPENSION OF STATUTE OF LIMITATIONS

Section 7436(d)(1) provides that the suspension of the limitations period for assessment in § 6503(a) of the Code applies in the same manner as if a notice of deficiency had been issued. Thus, pursuant to § 6503(a), the mailing of the Notice of Determination by certified or registered mail will suspend the statute of limitations for assessment of taxes attributable to the worker classification and § 530 issues. Generally, the statute of limitations for assessment of taxes attributable to the worker classification and § 530 issues is suspended for the 90-day period during which the taxpayer can begin a suit in Tax Court, plus an additional 60 days thereafter. Moreover, if the taxpayer does file a timely petition in the Tax Court, the statute of limitations

for assessment of taxes attributable to the worker classification and § 530 issues will be suspended under section 6503(a) during the Tax Court proceedings, and for 60 days after the Tax Court decision becomes final.

RESTRICTIONS ON ASSESSMENT

Section 7436(d)(1) provides that the restrictions on assessment in § 6213 of the Code apply in the same manner as if a notice of deficiency had been issued. Thus, pursuant to § 6213(a), the Service is precluded from assessing the taxes attributable to the worker classification and § 530 issues prior to expiration of the 90-day period during which the taxpayer may file a timely Tax Court petition. If the taxpayer does file a timely Tax Court petition, § 6213(a) generally precludes the Service from assessing taxes attributable to the worker classification and § 530 issues until the decision of the Tax Court has become final. If the taxpayer does not file a timely Tax Court petition before the 91st day after the Notice of Determination was mailed, the employment taxes attributable to the workers described in the Notice of Determination may thereafter be assessed.

AGREED SETTLEMENTS

If the taxpayer wishes to settle the worker classification and § 530 issues on an agreed basis before issuance of a Notice of Determination, the taxpayer must formally waive the restrictions on assessment contained in §§ 7436(d)(1) and 6213. This will generally be accomplished by execution of an agreed settlement that contains the following language:

I understand that, by signing this agreement, I am waiving the restrictions on assessment provided in sections 7436(d) and 6213(a) of the Internal Revenue Code of 1986.

The Service will not assess employment taxes attributable to worker classification or § 530 issues unless either the Service has issued a Notice of Determination to the taxpayer and the 90-day period for filing a Tax Court petition has expired or, alternatively, the taxpayer has waived the restrictions on assessment. If the Service erroneously makes an assessment of taxes attributable to worker classification and § 530 issues without first either issu-

ing a Notice of Determination or obtaining a waiver of restrictions on assessment from the taxpayer, the taxpayer is entitled to an automatic abatement of the assessment. However, once any such procedural defects are corrected, the Service may reassess the employment taxes to the same extent as if the abated assessment had not occurred.

EFFECTIVE DATE

Section 1454 of TRA '97 is effective as of August 5, 1997. Thus, assessments that were made prior to the August 5,

1997, effective date of the Act are not subject to the new legislation or the procedures discussed above. All employment tax examinations involving worker classification and/or § 530 issues that were pending as of August 5, 1997, are subject to the new legislation.

DRAFTING INFORMATION

The principal author of this notice is Lynne A. Camillo of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). The Service invites comments with respect to the

issues addressed in this notice, the form of the attached Notice of Determination, as well as with respect to any procedural issues which should be addressed in forthcoming guidance. Written comments should be submitted to Lynne A. Camillo of the Employee Benefits and Exempt Organizations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW, Room 5329, Washington, DC 20224. For further information regarding this notice contact Lynne A. Camillo at (202) 622-6040 (not a toll-free call).