



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D C. 20224

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MEMORANDUM FOR EO EXAMINATION EMPLOYEES

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SUBJECT: New Procedures for Employment Tax Issues under IRC 7436

Purpose

This memo gives new procedures and guidance on:

- conducting audits involving employment tax issues
- the proper forms and letters to use when you process a Substitute for Return (SFR).

Background

IRC 7436 historically allowed a taxpayer to petition Tax Court to review audit determinations involving only worker classification (WC), or Section 530 relief. However, two Tax Court decisions effectively expanded the court's jurisdiction to include certain wage issues (*SECC Corp. v. Commissioner*, 142 T.C. 225 [2014]; *American Airlines, Inc. v. Commissioner*, 144 T.C. 24 [2015]). Now examiners must decide whether certain wage issues fall under IRC 7436 and use new forms and letters.

WC or Wage Issue

First determine whether an issue is a WC or a wage issue. All WC issues are IRC 7436 issues, whether the payments were reported on a Form 1099-MISC. Wage issues are IRC 7436 issues if they meet one of the following conditions:

- Payment was reported on Form 1099-MISC (bonus, fringe benefit, travel allowance, etc.)
- Taxpayer raises WC arguments
- Taxpayer raises Section 530 arguments

Section 530

Section 530 always applies to WC issues but never applies to wage issues. However, if a taxpayer raises Section 530 about a wage issue, the wage issue will now fall under IRC 7436.

When wage issues are subject to IRC 7436, you must do all of the following:

- Give Publication 1976 to the taxpayer.
- Explain in your workpapers that Section 530 is not applicable because this is a wage issue.
- Explain whether the statutory requirements were met as if Section 530 was applicable.

IRC 3509 Rates

For wage issues subject to IRC 7436, reduced rates under IRC 3509 don't apply. Advise the taxpayer that these reduced rates don't apply because this is a wage issue and not a WC issue. Document and explain this in your workpapers.

Classification Settlement Program (CSP)

CSP is never available for wage issues, regardless of whether IRC 7436 applies. However, when the wage issue is subject to IRC 7436, you should note this and address CSP criteria in your workpapers.

Right to Petition Tax Court under IRC 7436

For wage issues subject to IRC 7436, inform the taxpayer of the right to petition Tax Court before the tax is assessed. If the taxpayer agrees to the proposed adjustment, the taxpayer will waive this right by signing the Form 2504-T. If the taxpayer doesn't agree, we'll issue a 30-day letter.

Agreement Form

The agreement form you use depends on whether there was a WC and/or a wage issue, and if the wage issue is subject to IRC 7436.

- Form 2504-T, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Subject to IRC 7436)
 - Use for any WC or wage adjustment subject to IRC 7436
 - Must not include non-IRC 7436 adjustments
 - Includes language waiving the right to petition Tax Court
 - Includes a selectable paragraph for situations when WC was not examined

Note: This form replaces Form 2504-WC.

- Form 2504, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436)
 - Use for all non-IRC 7436 adjustments when you **also examined WC issues**
 - Must not include IRC 7436 adjustments
 - Doesn't include language waiving the right to petition Tax Court
- Form 2504-S, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436; Worker Classification or Section 530 Issues Not Addressed in this Exam)
 - Used for non-IRC 7436 adjustments when you **didn't examine WC issues**
 - Must not include IRC 7436 adjustments
 - Doesn't include language waiving the right to petition Tax Court

Note: This form indicates that IRS didn't examine WC, and that a Section 530 prior audit safe-haven won't apply in subsequent years.

Note: You may need to use multiple agreement forms if you have IRC 7436 and non-IRC 7436 adjustments.

Report Forms

A checkbox was added to Forms 4666, 4667, 4668 and 4668-C to indicate whether the adjustments are:

- Non-7436 Adjustments
- 7436 Adjustments (WC Issues)
- 7436 Adjustments (Wage Issues)

Note: You must prepare separate report forms for each category of adjustments even if the adjustments can be included on the same agreement form. For the Form 4666, you can combine the 7436 wage issues and the 7436 WC issues.

New Letters for Unagreed Cases

The letter you use depends on whether the proposed adjustments are for IRC 7436 or non-IRC 7436 issues and the amount of time remaining on the statute of limitations. There must be at least 410 days remaining on the period of limitation if the taxpayer requests to go to Appeals.

Sufficient time on the statute of limitations

- Use Letter 950-C for all IRC 7436 issues (both WC and wage issues)
- Use Letter 950-D for all non-IRC 7436 issues
- Use both letters when your case has IRC 7436 and non-IRC 7436 issues

Insufficient time on the statute of limitations

- Use Letter 5153-F for all IRC 7436 issues (both WC and wage issues)
- Use Letter 5153-P for all non-IRC 7436 issues
- Use both letters when your case has IRC 7436 and non-IRC 7436 issues

Note: Letter 3523, Notice of Employment Tax Determination Under IRC 7436, is **prepared and mailed by EO Mandatory Review** for cases that are unagreed and not protested, or have insufficient time on the statute of limitations. L3523 allows the taxpayer 90 days to petition Tax Court.

Disposition of the Case Not Going to Appeals

- For cases with only unagreed non-IRC 7436 issues, close the case to the Closing Unit following standard IRM procedures.
- For cases with only unagreed IRC 7436 issues, close the case to EO Mandatory Review for issuance of Letter 3523.
- For cases with unagreed IRC 7436 and non-IRC 7436 issues, follow the partial/quick assessment procedures for the non-IRC 7436 issues before closing the case to EO Mandatory Review. Send the entire case file to EO Mandatory Review to issue Letter 3523 for the IRC 7436 issues.

SFR Procedure Change

When processing a Substitute for Return (SFR) the new [Form 13496-A \(08-2017\)](#) is required. It references Forms 4667, 4668, 4668-B, 4668-C but not the Form 2504 series.

Effect on Other Documents

We'll incorporate this guidance into the appropriate IRMs throughout [Chapters 4.75](#) and [4.90](#) before April 17 2020.

Effective Date

This memo is effective immediately.

Contact:

Find reference materials and job aids in the IRC 7436 Reference Folder [IRC 7436 Resources](#)
Submit your questions to Mandatory Review via [*TEGE EO Review Staff](#)

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