

CC-2016-002

December 17, 2015

Subject: Change in Litigation Position regarding section 7436 Tax Court Jurisdiction **Cancel Date:** Effective until further notice/Indefinite

Purpose

This Notice informs Counsel attorneys of a change in litigation position concerning the scope of the Tax Court's jurisdiction under Internal Revenue Code section 7436. It supersedes Chief Counsel Notice CC-2015-001, Guidance for certain employment tax cases (including employment tax issues in CDP cases) (December 5, 2014), which instructs attorneys to continue to follow Notice 2002-5, 2002-1 C.B. 320, in determining whether to advise that a Notice of Determination of Worker Classification (NDWC) should be issued. Until further guidance is published, Counsel attorneys are instructed to:

- (1) no longer argue that a NDWC is a prerequisite to Tax Court jurisdiction when the four requirements discussed below are met;
- (2) continue to defend on the merits that Section 530 of the Revenue Act of 1978 (Section 530) and I.R.C. section 3509 do not apply if the Service has not reclassified the workers at issue from nonemployee to employee status with regard to services rendered;
- (3) coordinate with the Office of the Associate Chief Counsel (Tax Exempt and Government Entities) (TEGE) regarding Section 530 or section 3509 on issues not covered by paragraphs 4 and 5, below;
- (4) coordinate with the Office of the Tax Exempt and Government Entities Division Counsel (TEGEDC) any case-specific matter in litigation that references *SECC*, *American Airlines*, or other language implicating section 7436 (TEGEDC will further coordinate such issues with TEGE); and
- (5) coordinate with TEGEDC any case-specific Examination or Collection issue relating to the application of section 7436 or the possible issuance of a NDWC (TEGEDC will further coordinate such issues with TEGE).

Discussion

Notice 2002-5 states that a NDWC is a prerequisite for Tax Court jurisdiction under section 7436 (similar to the jurisdictional requirement of the issuance of a notice of deficiency in an income tax case). The Office of Chief Counsel has historically argued that the Tax Court may only exercise jurisdiction over employment status controversies when the Service has sent, by certified or registered mail, a NDWC to a taxpayer. Accordingly, without a NDWC, the taxpayer could not petition the Tax Court and if it did, the Tax Court would lack jurisdiction.

Distribute to:	X Tax Litigation staff	Tax Litigation staff & Support personnel
	All Personnel	X Electronic Reading Room

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In two recent opinions, *SECC Corp. v. Commissioner*, 142 T.C. 225 (2014), and *American Airlines, Inc. v. Commissioner*, 144 T.C. 24 (2015), the Tax Court concluded that its jurisdiction under section 7436 is broader than the Service's historical view. Based on the Tax Court's opinions, the following four requirements must be satisfied:

- (1) an examination in connection with the audit of any person;
- (2) a determination by the Secretary that –
 - one or more individuals performing services for such person are employees of such person for purposes of subtitle C, OR
 - such person is not entitled to the treatment under Section 530(a) with respect to such an individual;
- (3) an “actual controversy” involving the determination as part of an examination; and
- (4) the filing of an appropriate pleading in the Tax Court.

See, e.g., *American Airlines*, 144 T.C. at 32.

Counsel will no longer argue that a NDWC is a prerequisite to Tax Court jurisdiction when the four requirements set forth above are satisfied. TEGE anticipates updating Notice 2002-5 to reflect this change in the future. Attorneys in SBSE Division Counsel or LBI Division Counsel are required to coordinate with TEGEDC and TEGE, as described above.

Notwithstanding the change in litigation position regarding the Tax Court's jurisdiction, Counsel will continue to defend on the merits that Section 530 and section 3509 do not apply to any tax periods in which the taxpayer treated the workers as employees for federal employment tax purposes with regard to services provided. More specifically, as explained further below, Counsel will not equate a finding that the requisite actual controversy exists for section 7436 purposes with a finding that the taxpayer did not treat the workers as employees for employment tax purposes, a threshold requirement for application of Section 530 and section 3509.

The threshold requirement for application of Section 530 is that a taxpayer did not treat an individual as an employee for purposes of employment taxes, defined by Section 530(c)(1) as “any tax imposed by subtitle C of the Internal Revenue Code.” Thus, where a taxpayer treated an individual as an employee for purposes of employment taxes, Counsel will defend on the merits that Section 530 does not apply, without a need to reach the elements that a taxpayer must satisfy to be entitled to relief under Section 530.¹ Accordingly, Counsel will distinguish (1) the threshold question whether a taxpayer has raised a claim that Section 530 is applicable to the tax periods at issue, creating the required controversy under section 7436, from (2) the question of whether a taxpayer satisfies the requirements to be entitled to relief under Section 530.

Similarly, the threshold requirement for application of section 3509 is that an employer fails to deduct and withhold any tax under chapter 24 (income tax withholding) or subchapter A of chapter 21 (FICA tax on employees) with respect to any employee by reason of treating such employee as not being an employee for purposes of such chapter or subchapter. Thus, where a taxpayer treated an individual as an employee within the meaning of the income tax

¹ While Revenue Procedure 85-18, 1985-1 C.B. 518, section 3.03, provides guidelines for determining whether a taxpayer did not treat an individual as an employee within the meaning of Section 530(a)(1), such as the withholding of employment taxes or filing of Form W-2, questions regarding treatment as an employee for Section 530 purposes must be coordinated with TEGE.

