

CC-2015-001

December 5, 2014

Subject: Guidance for certain employment tax cases (including employment tax issues in CDP cases) **Cancel Date:** Effective until further notice

UIL: 7436.00-00

Purpose:

In light of the Tax Court's opinion in SECC Corporation v. Commissioner, 142 T.C. No. 12 (April 3, 2014), this notice provides guidance on when to advise the Service to issue a Notice of Determination of Worker Classification (NDWC) under section 7436 and how to handle docketed Tax Court cases (including CDP cases) where the taxes at issue are subtitle C employment taxes.

Guidance for Advising the Service

Chief Counsel attorneys should continue to advise the Service that section 7436 procedures must be followed only when the taxpayer did not treat its worker as providing services as an employee during the period under exam. Chief Counsel attorneys should continue to follow Notice 2002-5, 2002-1 C.B. 320, in determining whether to advise that a NDWC should be issued. All other employment tax adjustments should continue to be assessed pursuant to section 6201.

Guidance for Pending and Future Tax Court Cases

Collection Due Process (CDP) Cases. If the petitioner argues the underlying employment tax assessment was invalid because it did not receive a NDWC, attorneys should contact TEGE Area Counsel to determine whether the case should be coordinated with, or transferred to, TEGE.

Non-CDP Cases. If the petitioner seeks Tax Court review of its employment tax liability and no NDWC was issued, attorneys should file a motion to dismiss for lack of jurisdiction.¹ If the facts are distinguishable from the facts in SECC, the motion to dismiss should argue that the Tax Court lacks jurisdiction because the petitioner was not issued a NDWC and distinguish the facts of the case before the Tax Court from those of SECC. In cases indistinguishable from SECC, the motion to dismiss should acknowledge the court's opinion in SECC as precedential, note the Service's disagreement with the holding, and urge that a determination under section 7436(a) is

¹ If the case is not assigned to a TEGE Area Counsel attorney, the assigned attorney should contact TEGE Area Counsel to determine whether the case should be coordinated with, or transferred to, TEGE.

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made solely by issuing a NDWC.² Attorneys may continue to note the jurisdictional issue as appropriate as the case proceeds (e.g., in the pretrial memorandum, at trial, and on brief).

Background

In SECC, Taxpayer paid workers wages reported on Forms W-2, *Wage and Tax Statement*, and “equipment lease payments” reported on Forms 1099-MISC, *Miscellaneous Income*. The Service assessed tax on the equipment lease payments as additional wages because they were not paid under an accountable plan pursuant to section 62(c). Taxpayer filed a protest and requested a hearing with the Office of Appeals. In the protest, Taxpayer contended that for the periods in issue (1) the equipment lease payments were not properly classified as wages, (2) its workers were independent contractors with respect to both the amounts paid to them as wages and the amounts paid to them as equipment lease payments, and (3) its liability with regard to the equipment lease payments should be reduced under section 3509(a) or section 3402(d). Appeals returned the case to Exam for additional development. Exam reviewed the case file and returned the file to Appeals. Appeals agreed with Exam and on April 15, 2011, sent a closing letter informing Taxpayer that it was rejecting Taxpayer’s appeal and that the employment taxes would be assessed in the amounts determined. In May 2011, the IRS assessed the taxes and sent a notice of adjustment to Taxpayer asking for payment. On February 13, 2012, Taxpayer petitioned the Tax Court. Taxpayer and the Service each filed a motion to dismiss for lack of jurisdiction because the Service did not issue a NDWC. Taxpayer argued that the failure to issue a NDWC meant the assessment was invalid. The Service argued that section 7436 did not apply because Taxpayer treated its workers as employees.

The Tax Court denied both motions. The Tax Court found that Taxpayer “treated its workers in dual capacities” as employees and independent providers of leased equipment and held that the Appeals closing letter was evidence of a determination which related to an actual controversy. The court held further that the determination related to matters specified in section 7436 over which it had jurisdiction. The court rejected the longstanding position that the NDWC constitutes the “notice of determination” required for Tax Court jurisdiction under section 7436. See Henry Randolph Consulting v. Commissioner, 113 T.C. 250 (1999); Notice 2002-5. Instead, the Tax Court read section 7436(a) as providing jurisdiction over a controversy involving a determination, “without regard to certified mailing and without regard to formal ‘notice’.” The court relied on two statements in the legislative history to support a conclusion that a determination could be made in nontraditional ways and that a failure to agree between the Service and a taxpayer is a determination. Additionally, because the Service did not send notice by certified or registered mail, the 90-day period for petitioning the court under section 7436(b)(2) did not apply. A dissenting opinion noted that the majority opinion is not reconcilable with section 7436(d), which incorporates many of the rules that apply in deficiency cases, specifically section 6213, which prohibits the Service from assessing and collecting tax before it has sent a Notice of Deficiency (NOD), and section 6503(a), which provides that the NOD suspends the running of the period of limitations for the Service to assess and collect tax.

Discussion

Section 7436(a) provides if, in connection with an audit of any person, there is an actual controversy involving the Secretary’s determination that (1) one or more individuals performing

² As of the date of this notice, the SECC case is ongoing. The Service may contest the jurisdictional issue in SECC, including by appealing the Tax Court’s final decision on the merits of the case.

services for a taxpayer are the taxpayer's employees or (2) a taxpayer is not entitled to treatment under Section 530 of the Revenue Act of 1978, the Tax Court may determine whether such determination is correct and the proper amount of employment tax under such determination. Section 7436(b)(1) provides a petition may only be filed by the person for whom services were performed. Section 7436(b)(2) provides if notice of the determination described in subsection (a) is sent by certified or registered mail, a proceeding in Tax Court must be filed before the 91st day after the date of such mailing. Section 7436(d)(1) imports the principles of selected Code sections applicable to deficiency proceedings to proceedings brought under section 7436 "in the same manner as if the Secretary's determination described in subsection (a) were a notice of deficiency."

We disagree with the Tax Court's creation of a distinction between the determination referenced in section 7436(a) and the notice of determination referenced in section 7436(b)(2) and its holding that only the former is necessary to establish jurisdiction under section 7436. This interpretation leaves unanswered numerous questions, including when a sufficient "determination" is made in the course of an examination to justify jurisdiction and when the resulting suspension of the limitations period and corresponding restrictions on assessment and collection referenced in section 7436(d) apply. Requiring that a determination in section 7436(a) be clearly communicated to the taxpayer in a NDWC more closely reflects Congressional intent by treating a worker classification determination as if it were a deficiency determination.

Furthermore, we disagree with the Tax Court's finding that the Service made a determination on the issues covered by section 7436. A determination by the Service that an individual performing services is a taxpayer's employee and a determination that a taxpayer is not entitled to section 530 relief necessarily require that the taxpayer had not already treated such individual as its employee. In SECC, Taxpayer had treated the workers as employees for the services they performed. Thus, there was no section 7436 jurisdiction for those services. Even if the Service were to accept Taxpayer's position that the payments at issue were made to "independent providers of rental equipment," the Tax Court does not have jurisdiction under section 7436 with regard to the payments since they relate to the provision of equipment and not to a performance of services from which Taxpayer could petition the Tax Court under section 7436.

Contact TEGE Employment Tax Branch 1 attorney Michelle R. Weigelt by email or at (202) 317-6798 with any questions about this notice.

 / s/
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(Tax Exempt & Government Entities)