

## [26 CFR 7436]: Proceedings for Determination of Employment Status

Rev. Proc. 2022-13

### SECTION 1. PURPOSE.

This revenue procedure provides information about when and how the Internal Revenue Service (IRS) will issue a Notice of Employment Tax Determination Under IRC § 7436 (§ 7436 Notice)<sup>1</sup> and how taxpayers petition for Tax Court review of certain IRS determinations under Internal Revenue Code (Code) § 7436.<sup>2</sup> This revenue procedure modifies and supersedes Notice 2002-5, 2002-1 C.B. 320.

### SECTION 2. BACKGROUND AND SUMMARY OF CHANGES IN APPLICATION OF § 7436

.01 Section 7436 provides for Tax Court review of two types of employment tax determinations made by the IRS: (a) worker reclassification, and (b) section 530 relief determinations, and it allows the court to ascertain the proper amount of employment tax, penalties, and additions to tax resulting from those determinations. Section 7436(a) provides a remedy if, in connection with an audit of any person, there is an actual

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<sup>1</sup> The § 7436 Notice (Letter 3523) was formerly known as a Notice of Determination of Worker Classification and has been modified to reflect the expanded jurisdiction of the Tax Court under § 7436.

<sup>2</sup> All section references in this revenue procedure are to the Internal Revenue Code of 1986, or to section 530 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, as amended, unless otherwise noted. The uncodified statutory language of section 530 can usually be found in the publisher's notes following § 3401(a).

controversy involving a determination by the Secretary as part of an examination that:

(1) one or more individuals performing services for such person are employees of such person for purposes of subtitle C [worker reclassification], or

(2) such person is not entitled to the treatment under subsection (a) of section 530 of the Revenue Act of 1978 with respect to such an individual [section 530 relief].

Upon the filing of an appropriate pleading, the Tax Court may determine whether such a determination by the Secretary is correct and the proper amount of employment tax under such determination. Any such redetermination by the Tax Court shall have the force and effect of a decision of the Tax Court and shall be reviewable as such.

.02 The employment taxes that may be determined by the Tax Court are the taxes imposed by subtitle C, which include Federal Insurance Contributions Act (FICA) taxes, Railroad Retirement Tax Act (RRTA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and the collection of income tax at source on wages (ITW).

.03 Notice 2002-5 provides that a § 7436 Notice is a jurisdictional prerequisite for seeking Tax Court review under § 7436, similar to the jurisdictional requirement of the issuance of a notice of deficiency in an income tax case. Notice 2002-5 also provides that the IRS will issue a § 7436 Notice only after the IRS has determined that: (a) one or more individuals performing services for the taxpayer are employees for purposes of subtitle C, and (b) the taxpayer is not entitled to section 530 relief.

.04 Two Tax Court opinions, *SECC Corp. v. Commissioner*, 142 T.C. 225 (2014), and

*American Airlines, Inc. v. Commissioner*, 144 T.C. 24 (2015), expanded the Tax Court's jurisdiction under § 7436 related to worker classification determinations beyond the limitations set forth in Notice 2002-5. Specifically, the Tax Court held that a § 7436 Notice was not a jurisdictional requirement, and that if the IRS has made a worker classification or section 530 relief determination, the determination requirement of § 7436 is met regardless of whether the IRS issues a § 7436 Notice. The decisions are inconsistent with the jurisdictional requirements described in Notice 2002-5.

.05 The § 7436 Notice continues to be the IRS's formal documentation informing a taxpayer of a determination concerning worker reclassification or section 530 relief. However, the Tax Court has clarified that the "determination" itself is what gives rise to Tax Court jurisdiction and no particular form is required to be provided to the taxpayer before a "determination" is considered made. Accordingly, even in the absence of the issuance of a § 7436 Notice, a taxpayer may petition the Tax Court on an IRS worker reclassification or section 530 relief determination to the extent that the determination meets the requirements set forth in the Tax Court opinions, as explained in section 3 of this revenue procedure.

.06 Furthermore, in accordance with the procedures set forth in section 4 of this revenue procedure, the IRS will issue a § 7436 Notice as part of an audit if one or both of the following determinations is made and there is a controversy regarding the determination: (a) one or more individuals performing services for the taxpayer are to be reclassified as employees for purposes of subtitle C, or (b) the taxpayer is not entitled to section 530 relief.

## SECTION 3. APPLICATION AND SCOPE OF § 7436

.01 *Jurisdictional requirements.* The Tax Court has jurisdiction under § 7436 only if all the following four requirements are satisfied:

- (1) the IRS conducts an examination in connection with an audit of any person;
- (2) as part of the audit, the IRS determines that –
  - (a) one or more individuals performing services for the person are employees of the person for purposes of subtitle C (worker reclassification), or
  - (b) the person is not entitled to the relief under section 530(a) with respect to such an individual (section 530 relief);
- (3) there is an “actual controversy” involving the determination as part of an examination; and
- (4) the person for whom the services at issue were performed files an appropriate pleading in the Tax Court.

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

The following sections, 3.02 through 3.05, discuss each of these requirements.

.02 *Examination in connection with an audit.*

(1) Worker reclassification or section 530 relief determinations are reviewable by the Tax Court only if made by the IRS as part of an examination under subtitle C in connection with an audit of a person for whom the services are performed. While § 7436(a) uses the phrase “audit of any person”, § 7436(b)(1) provides that a petition may be filed only by the person for whom the services are performed. Thus, the audit

must be of such a person. For purposes of this section, the examination process includes consideration by the Independent Office of Appeals (Appeals) and is not complete until the Appeals process concludes.

(2) Examinations in connection with an audit of a taxpayer's income tax, excise tax, pension plan, employer shared responsibility payments for health coverage under § 4980H, or other tax liabilities unrelated to section 530 relief or worker reclassification for the purpose of subtitle C do not provide a basis for Tax Court review under § 7436(a).

(3) Similarly, determinations made by the IRS outside of the examination process are not determinations made in an examination for purposes of § 7436. For example, the Tax Court has no jurisdiction over an IRS determination of employment status made in response to the filing of a Form SS-8 "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding." The Form SS-8 process is a taxpayer-initiated request for an IRS ruling and does not involve an examination in connection with an audit. Other examples of determinations that are not determinations made in an examination for purposes of § 7436 include system generated notices (such as CP 2000 letters) or any determinations made in examinations in connection with backup withholding.

*.03 Determination concerning worker reclassification or section 530 relief.*

(1) Section 7436 grants jurisdiction to the Tax Court only for determinations involving worker reclassification or section 530 relief. Other determinations by the IRS in connection with proposing employment tax adjustments are not subject to review by the

Tax Court.

(2) The IRS makes a worker reclassification determination when it concludes that an individual who was treated by a taxpayer as a non-employee should be reclassified as an employee for subtitle C purposes.

(3) The IRS makes a section 530 relief determination when it concludes that: (a) section 530 is not applicable to an employment tax issue between a taxpayer and the IRS<sup>3</sup>, or (b) the taxpayer does not meet the statutory requirements of section 530 with respect to an individual whom the IRS is reclassifying as an employee as part of an employment tax exam<sup>4</sup>.

(4) Determinations made by the IRS in connection with proposed employment tax adjustments that do not involve the reclassification of individuals from non-employees to employees or the denial of section 530 relief are not determinations subject to § 7436.

Determinations not subject to § 7436 review include determinations supporting proposed employment tax adjustments that have rejected assertions by a taxpayer that

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<sup>3</sup> Based on the language of section 530(a)(1) and the legislative history of section 530, section 530 applies only to matters involving the issue of the status of an individual as an employee or non-employee and not to matters involving the issue of the proper characterization of payments to that individual. Specifically, section 530 does not apply to matters involving the issue of whether a particular type of payment made to an employee constitutes “wages” as defined under the FICA, FUTA, or income tax withholding provisions. Nor does section 530 apply to matters involving the issue of whether services performed by an employee constitute “employment” as defined under the FICA, FUTA, or income tax withholding provisions. Section 530 is not applicable to these matters since there is no issue concerning whether the individual is an employee or non-employee.

<sup>4</sup> If section 530 applies to the matter (see footnote 3, supra) for any period, a taxpayer must meet each of the following requirements for the period to be entitled to section 530 relief: (1) the taxpayer timely filed all required federal tax returns, including information returns, consistent with the taxpayer’s treatment of the individual as not being an employee (reporting consistency requirement); (2) the taxpayer did not treat the individual or any individual holding a substantially similar position as an employee (substantive consistency requirement); and (3) the taxpayer had a reasonable basis for not treating the individual as an employee (reasonable basis requirement). See Rev. Proc. 85-18, 1985-1 C.B. 518, for more information on section 530.

amounts paid to employees are loan repayments, distributions, or are excepted from the definition of “wages”, or are for services excepted from “employment” under the FICA, FUTA, or ITW provisions. Determinations not subject to § 7436 review also include determinations that a taxpayer is liable for backup withholding under § 3406 since backup withholding does not apply with respect to workers determined to be employees.

*.04 Actual controversy involving worker classification or section 530 relief.*

(1) An actual controversy involving worker reclassification determinations exists if, for the taxable period: (a) a taxpayer did not treat an individual as an employee (or treated an individual as both an employee and a non-employee); (b) the IRS reclassifies the individual as an employee and proposes to assess employment tax on the remuneration paid to the individual as a non-employee (including with respect to just the portion of services for which the taxpayer treated the worker as a non-employee); and (c) no agreement is reached on the issue during the examination process. A taxpayer will be considered to have treated an individual as an employee for the taxable period or taxable year according to the guidelines set forth in Section 3.03 of Rev. Proc. 85-18 or any subsequent guidance.

(2) No actual controversy involving worker reclassification exists if the taxpayer agrees the amounts were paid in connection with an employer-employee relationship but argues that under the FICA, FUTA, or income tax withholding provisions of the Code the amounts are not “wages” (for example, because the amounts are paid as loan repayments, distributions, or are otherwise not wages) or the services do not constitute “employment.”

(3) An actual controversy involving section 530 relief determinations exists if: (a) a taxpayer alleges that it is entitled to section 530 relief; (b) the IRS determines that section 530 is not applicable or that the taxpayer has not satisfied the statutory requirements of section 530; and (c) no agreement is reached on the issue during the examination process.

(4) However, any such determination will not be subject to § 7436 review if the taxpayer agrees to the proposed employment tax adjustments and executes a waiver that includes specific language that waives the restrictions on assessment and Tax Court review.

*.05 Filing of an appropriate pleading.*

(1) Section 7436(a) confers jurisdiction on the Tax Court to review the requisite determinations only upon the filing of a proper pleading (i.e., petition). Pursuant to § 7436(b)(1), a petition may be filed only by the person for whom the services are performed. Thus, individuals who perform services may not seek review of the IRS determinations under § 7436. In addition, because § 7436(a) specifies that there must be an actual controversy regarding a determination that the individuals performing services for the person are employees of the person, review may not be sought by a third party, including a CPEO, reporting agent, payroll processing entity, or an agent under § 3504, that has not been determined by the IRS to be the person for whom the services are performed as an employee.

(2) Pursuant to § 7436(b)(2), a taxpayer's petition for review must be filed with the Tax Court before the 91<sup>st</sup> day after the IRS mails a § 7436 Notice by certified or registered

mail. Pursuant to § 6213(a), however, the taxpayer's petition for review must be filed with the Tax Court within 150 days after the IRS has mailed a § 7436 Notice addressed to a person outside of the United States. The IRS will specify the last day by which the taxpayer may timely file a petition on the first page of the § 7436 Notice. The period to timely file a petition may not be extended or suspended. Thus, contacting the IRS for more information, or receiving other correspondence from the IRS, will not change the period for timely filing a petition with the Tax Court.

(3) A taxpayer that does not file a Tax Court petition within the allotted time may still obtain judicial review of the IRS determinations by paying the tax for one worker for each taxable period or taxable year and filing a claim for refund as required by § 7422. If the claim for refund is denied, or if the IRS has not responded to the claim for refund after six months, the taxpayer may file a refund suit in the appropriate federal district court or the United States Court of Federal Claims.

#### SECTION 4. ISSUANCE OF § 7436 NOTICE

##### .01 § 7436 Notice.

(1) The § 7436 Notice informs a taxpayer that the IRS has made one or both of the following determinations:

(a) that for purposes of employment taxes, one or more individuals performing services for the taxpayer are to be legally reclassified as employees (worker reclassification determination); and/or

(b) that the taxpayer is not entitled to section 530 relief either because the taxpayer does not satisfy the statutory requirements or because section 530

does not apply (section 530 relief determination).

(2) The § 7436 Notice will set forth the amount of employment tax, additions to tax, and/or penalties resulting from the determinations and will be sent by certified or registered mail.

(3) The § 7436 Notice advises taxpayers of the opportunity to seek Tax Court review and provides information on how to do so. It shows each type of tax (FICA, FUTA, and/or ITW) with the proposed employment tax adjustment by taxable period or taxable year.

*.02 Pre-Determination Letter.* In most cases, a taxpayer that receives a § 7436 Notice will have previously received a Letter 950-C that: (a) explains the reasons for the IRS's determinations; (b) lists the proposed employment tax adjustments, penalties, and additions to tax; and (c) describes the taxpayer's right to either agree to the proposed employment tax adjustments or to protest the proposed adjustments to Appeals within thirty days of the date of the letter. If the taxpayer does not respond to the letter by agreeing to the proposed adjustments or by filing a timely protest to Appeals, the IRS will provide the taxpayer a § 7436 Notice. If the taxpayer responds to the letter by filing a timely protest to Appeals (or if the case proceeds to Appeals by way of the employment tax early referral procedures) and the § 7436 issues are not resolved in Appeals, the IRS will provide the taxpayer a § 7436 Notice. See Sec. 4 of Rev. Proc. 99-28, 1999-2 C.B. 109, for information concerning the employment tax early referral procedures.

*.03 Agreement.* The IRS will provide taxpayers with a § 7436 Notice at the conclusion

of the examination process involving a determination of worker reclassification or section 530 relief, or after consideration of these determinations by Appeals, unless the taxpayer has agreed to the employment tax liabilities. Agreement is generally accomplished using Form 2504-T “Agreement to Assessment and Collection of Additional Employment Tax and Acceptance of Overassessment (Employment Tax Adjustments Subject to IRC 7436).”

.04 *Presumption of Correctness*. The determinations made in the § 7436 Notice are presumptively correct and the taxpayer (petitioner) bears the burden of proving that those determinations are erroneous. *Ewens and Miller, Inc. v. Commissioner*, 117 T.C. 263 (2001). See also Tax Court Rule 142(a).

## SECTION 5. SMALL TAX CASE PROCEEDINGS

At the option of the taxpayer, and with the concurrence of the Tax Court, proceedings under § 7436 may be conducted pursuant to the Tax Court's simplified procedures for small tax cases if the amount of employment taxes in dispute is \$50,000 or less for each calendar quarter involved. See § 7436(c). The simplified procedures for small tax cases are set forth in § 7463 and Title XVII (Rules 170 – 174) of the Tax Court's Rules of Practice and Procedure.

## SECTION 6. RESTRICTIONS ON ASSESSMENT

.01 Pursuant to § 7436(d)(1), the principles of § 6213 regarding restrictions on assessment apply to § 7436 proceedings in the same manner as if the § 7436 Notice

were a notice of deficiency.<sup>5</sup> Therefore, after the mailing of the § 7436 Notice, the IRS is precluded from assessing the taxes identified in the § 7436 Notice prior to expiration of the 90-day period, or 150-day period if the § 7436 Notice is addressed to a person outside of the United States, during which the taxpayer may file a Tax Court petition.

.02 If the taxpayer does not file a timely Tax Court petition, the IRS will assess the employment taxes identified in the § 7436 Notice.

.03 Employment tax adjustments that do not arise from worker reclassification or section 530 relief determinations are not reviewable by the Tax Court pursuant to § 7436 and may be assessed pursuant to § 6201 without issuance of a § 7436 Notice.

## SECTION 7. SUSPENSION OF PERIOD OF LIMITATION

.01 Pursuant to § 7436(d)(1), the principles of § 6503(a) regarding the suspension of the running of the period of limitation on assessment apply to § 7436 proceedings in the same manner as if the § 7436 Notice were a notice of deficiency. Therefore, the mailing of the § 7436 Notice by certified or registered mail will suspend the period of limitation on assessment attributable to the IRS worker reclassification and/or section 530 relief determinations.

.02 Under the principles of § 6503(a), the period of limitation on assessment is suspended for the 90-day period during which the taxpayer can begin a suit in the Tax Court, plus an additional 60 days thereafter. If the taxpayer files a timely petition in the Tax Court, the period of limitation on assessment will be suspended until the decision of

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<sup>5</sup> Only the principles of subsections (a), (b), (c), (d), and (f) of § 6213 apply to proceedings under § 7436.

the Tax Court becomes final and for 60 days thereafter.

## SECTION 8. APPEALS CONSIDERATION AFTER THE FILING OF A TAX COURT PETITION

Cases docketed in the Tax Court will generally be referred to Appeals for consideration of settlement. See Rev. Proc. 2016-22, 2016-15 I.R.B. 577.

## SECTION 9. AGREED SETTLEMENTS

.01 If the taxpayer wishes to settle the § 7436 issues on an agreed basis, either before or after issuance of the § 7436 Notice, but before expiration of the 90-day period for filing a Tax Court petition, the taxpayer must formally waive the restrictions on assessment set forth in §§ 7436(d)(1) and 6213(a). This waiver will generally be accomplished using Form 2504-T.

.02 The IRS will not assess employment taxes attributable to worker reclassification or section 530 relief determinations unless either: (a) the IRS has provided a § 7436 Notice to the taxpayer and the 90-day period for filing a Tax Court petition has expired, or (b) the taxpayer has waived the restrictions on assessment. If the IRS erroneously assesses taxes attributable to these determinations without first either providing taxpayer a § 7436 Notice or obtaining a waiver of the restrictions on assessment from the taxpayer, the IRS will abate the assessment. However, once any such procedural defects are corrected, the IRS may reassess the employment taxes to the same extent as if the abated assessment had not occurred, provided the period of limitations remains open.

## SECTION 10. EFFECT ON OTHER DOCUMENTS

Notice 2002-5, 2002-1 C.B. 320, is modified and superseded. Furthermore, Revenue Ruling 2009-39, 2009-52 I.R.B. 951, is modified in that Letter 3523 “Notice of Employment Tax Determination Under IRC § 7436,” is not a jurisdictional prerequisite to Tax Court review.

## SECTION 11. EFFECTIVE DATE

This revenue procedure is effective on February 7, 2022.

## SECTION 12. DRAFTING INFORMATION

The principal author of this revenue procedure is Nina Roca of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations and Employment Taxes).

For further information regarding this revenue procedure, contact Ms. Roca at (202) 317-6798 (not a toll-free call).