Employment Tax Issues
Agenda

• Worker Classification – Exam
• Worker Classification – Non-Exam
• 1120S Focus on Officer Compensation
• Back Up Withholding
• National Research Program (NRP)
• 2016 Updates
Worker Classification - Factors

• May be employees or independent contractors
• Three broad categories of evidence
  – Behavior Control
  – Financial Control
  – Relationship of Parties
Behavioral Control

- Control – when, where, and how
- Type and Degree of instructions
- Evaluation systems and feedback
- Training provided
- KEY – whether the business has the **RIGHT** to control whether or not they actually exercise that right
Financial Control

• Investment in the business
• Method of payment
• Cost reimbursement(s)
• Services available to others
• Opportunity for profit or loss
Relationship of the Parties

- Written Contracts?
- Permanency of the relationship
- Integral part of the business
- Benefits provided
Classification Settlement Program (CSP)

- Offered during an examination or Appeal
- Provides audit protection for certain years
- Ensures prospective treatment as employees
Resolving Worker Classification Outside of Examinations

• Voluntary Classification Settlement Program (VCSP)
• SS-8 Determination
• Form 8919
VCSP

- Businesses Only
- Simple Application Process
- Audit Protection for past years
- Prospective treatment of workers as employees
- Must include list of workers
- Small payment required
VCSP – Eligibility

- Consistently treated workers as non-employees
- Filed 1099s for previous three years
- Not be under Employment Tax audit by IRS, DOL or State Agency
- Not subject of a criminal investigation by the IRS
- Can be Tax-exempt or Government Entity
SS-8 Determination

• Individual or Business
• SS-8 Process is NOT an examination
• Determination Letters are binding on the Service
• Service may revoke the determination pending new facts
Form 8919

- Individual Only
- Evidence that worker is employee
- Attached to 1040
- Allows individual to pay only their share of Social Security and Medicare
- Identifies business who paid worker
1120 S – Officer Compensation – Applicable Law

- Officers are Employees for FICA (IRC 3121(d)(1); FITW (IRC 3401(c)) and FUTA (IRC 33-6(i))
- Rev. Rul. 73-361
- Rev. Rul. 74-44
Remuneration in Lieu of Wages

- Officer must receive some sort of remuneration, characterized as:
  - Distributions
  - Loans to Shareholders
  - Payment of Personal Expenses
  - Independent Contractor
  - Payments to Related Companies
Officer Compensation in Examinations

- Reasonable salary
- Comparable to a fair wage paid to unrelated party
- Corporate Officers are, by statute, employees
Backup Withholding

- IRC 3406 requires backup withholding
- IRC 3406(a) provides criteria:
  - Payee fails to furnish a TIN
  - IRS has notified payer that TIN is incorrect (CP2100)
  - Business fails to obtain correct TIN
Employer Responsibilities

- Reportable on Form 945
- Withholding rate = 28%
- Employer liable for full 28% if required to backup withhold but does not
NRP

• 6,000 randomly selected taxpayers
• Audits are complete
• Data is being perfected for future analysis
• Study results will be available in 2017
DOJ Tax Division
Civil Employment Tax Enforcement

- Lawsuits to Reduce Tax Assessments to Judgment
- Lawsuits to Collect Employment Tax Liabilities
- Lawsuits against Third Parties Paying Wages
- Counterclaims in Trust Fund Recovery Penalty Refund Suits
- Complaints for Civil Injunctions
  - Monitoring Injunctions and Contempt Proceedings
Recent Civil Injunctions

- **Randy G. Rogers** (E.D. Tennessee) (May 27, 2016)
- **Mauricio Consalter and Medici Health Care Providers SC** (N.D. Illinois) (May 12, 2016)
- **Edward G. Holsinger** (E.D. Virginia) (April 26, 2016)

https://www.justice.gov/tax/recent-civil-employment-enforcement-news
DOJ Tax Division
Criminal Employment Tax Enforcement

- Authorizing Grand Jury Investigations and Prosecutions for Matters referred to U.S. Attorneys’ Offices
- Investigations and Prosecutions Assigned to Tax Division Attorneys, either alone or with Assistant U.S. Attorneys
- Sentencing (Incarceration, Fines and Restitution)
Recent Criminal Prosecutions

• Michael Manning (E.D. Virginia) (sentenced May 31, 2016)

• Scott Sogge (D. South Dakota) (sentenced April 25, 2016)

• Kyle Archie & Linda Archie (D. Nevada) (guilty pleas April 22, 2016)

• Larry C. Thornton (W.D. Tennessee) (guilty plea March 28, 2016)

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Additional Resources for Addressing Employment Tax Violations

- Civil and Criminal Points of Contact in Tax Division
- Litigation Assistance to U.S. Attorneys’ Offices
- Updated Chapter in Criminal Tax Manual – September 2015
- Proposed Change to U.S. Sentencing Guidelines
- Employment Tax Enforcement Page on Tax Division Internet
<table>
<thead>
<tr>
<th>Hot Topics on IRS.gov</th>
<th>Search Word(s)</th>
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<tr>
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<tr>
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