



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

OFFICE OF
CHIEF COUNSEL

January 14, 2002

Number: **200211037**
Release Date: 3/15/2002
UIL No.: 3121.10-01

CC:TEGE:EOEG:ET1
POSTF-152539-01

MEMORANDUM FOR JUDITH M. PICKEN
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FROM: Michael A. Swim
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Office of Division Counsel/Associate Chief Counsel
(Tax Exempt and Government Entities)

SUBJECT: Application of Section 530 of the Revenue Act of 1978
Your reference TL-N-4061-01

This responds to your request for technical assistance regarding a series of questions involving the application of section 530 of the Revenue Act of 1978.

Issue

Whether an employer can receive relief under section 530 for a period following a period for which it failed to file Forms 1099-MISC reporting non-employee compensation.

Conclusion

Yes. It is possible for a taxpayer to receive section 530 relief for a subsequent year even if in a prior year it failed to file Forms 1099 (if it is otherwise entitled to section 530 relief for the subsequent year). As explained below, this position originates in the text of section 530(a)(1)(B), which provides that all federal tax returns, including information returns, required to be filed by the taxpayer with respect to the individual "for such period" are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee.

Facts

You provide three fact situations, as follows:

Situation # 1.—The Service examined the employment tax liability of Taxpayer A for the year 1999. The examination ended in March of 2001. In the course of that examination, the examiner determined that several of the taxpayer's workers, whom the

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taxpayer considered to be independent contractors, were employees for federal employment tax purposes. The taxpayer did not file Forms 1099-MISC reporting the payments it made to those workers during 1999. The same workers performed services for Taxpayer A in 2000. Taxpayer A filed Forms 1099-MISC reporting the amounts that it paid to the workers during 2000 as non-employee compensation.

Situation # 2.—The Service examined the employment tax liability of Taxpayer B for the year 1999. The examination concluded in January of 2001. In the course of that examination, the examiner determined that several of the taxpayer's workers, whom the taxpayer considered to be independent contractors, were employees for federal employment tax purposes. The taxpayer filed Forms 1099-MISC reporting the payments it made to those workers during 1999. The examiner determined that Taxpayer B was entitled to relief under section 530 for 1999. The same workers performed services for Taxpayer B in 2000 and 2001. The taxpayer did not file Forms 1099-MISC reporting the payments it made to those workers during 2000. Forms 1099 for payments made during 2001 are not yet due.

Situation # 3.—The Service examined the employment tax liability of Taxpayer C for the year 1999. The examination ended in January of 2001. In the course of that examination, the examiner determined that several of the taxpayer's workers, whom the taxpayer considered to be independent contractors, were employees for federal employment tax purposes. Each of the workers are performing the same services. Taxpayer C filed Forms 1099-MISC reporting the payments it made to only about half of those workers for 1999. The same workers performed services for Taxpayer C in 2000. Taxpayer C asked the revenue agent if it should file Forms W-2 or Forms 1099-MISC for 2000.

Discussion

As explained below, it is possible for an employer to receive section 530 relief for a subsequent year even if in a prior year it failed to file Forms 1099 (if it is otherwise entitled to section 530 relief for the subsequent year).

Section 530(a)(1) provides:

(1) In general.—If--

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee,

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then for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

[Emphasis added.]

The reading of the statute to permit a period-by-period test is set forth in the “Independent Contractor or Employee?” Training Materials, which are used to train employment tax examiners as well as Employment Tax attorneys in the Office of Chief Counsel. Training 3320-102 (Rev. 10-96) TPDS 84238I (“Training Materials”), available electronically at http://www.irs.treas.gov/prod/bus_info/sm_bus/operating.html.

The Training Materials provide the following statement regarding filing information returns (on page 1-6):

The first requirement a business must meet to obtain relief under section 530 is timely filing of all required Forms 1099 with respect to the worker for the period, on a basis consistent with the business’s treatment of the worker as not being an employee. This provision applies only “for the period.” Rev. Proc. 85-18, section 3.03(B). That is, if a business in a subsequent year files all required returns on a basis consistent with the treatment of the worker as not being an employee, then the business may qualify for section 530 relief for the subsequent period. If a business is not required to file, relief will not be denied on the basis that the return was not filed.

The Training Materials provide the following example (on page 1-6):

In 1992, C increased the number of mailings to five per year and raised the payment to the students to \$750. C continued to treat the four students as independent contractors. In 1992, no Forms 1099 were filed for the \$750 paid to each student. All required information returns were filed for 1993, 1994, and 1995. C would not be entitled to relief for the 1992 year as the “required” information returns were not filed. However, C may still qualify for section 530 relief for the subsequent years.

[Emphasis added.]

Section 3.02 of Rev. Proc. 85-18, 1985-1 C.B. 518, regarding filing of returns, provides:

For any period after December 31, 1978, the relief under section 530(a)(1) will not apply, even if the taxpayer has met the safe haven rules of paragraph 3.01 of this revenue procedure, if the appropriate Form 1099

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has not been timely filed with respect to the workers involved. See Rev. Rul. 81-224, 1981-2 C.B. 197.

(Rev. Rul. 81-224 holds that a taxpayer who failed to file Forms 1099 for the period examined was not entitled to relief under section 530. It does not address the question of relief for prior or subsequent periods.)

The Internal Revenue Manual Employment Tax Handbook contains an explanation of the reporting requirement at section 5.2.2.1 (04-21-1999) Consistency Requirement—Reporting Consistency. It states:

This provision applies only “for the period.” Rev. Proc. 85-18, section 3.03(B). That is, if a business in a subsequent year files all required returns on a basis consistent with the treatment of the worker as not being an employee, then the business may qualify for section 530 relief for the subsequent period.

The Employment Tax Handbook goes on to state:

Businesses that do not file timely Forms 1099 consistent with their treatment of the worker as an independent contractor, may not obtain relief under the provisions of section 530 for that worker in that year.

Further, IRS Publication 1976 (9-96), which the examiner is required to provide to the taxpayer, states:

Relief is not available for any year you did not file the required Forms 1099-MISC. If you filed the required Forms 1099-MISC for some workers, but not for others, relief is not available for the workers for whom you did not file Forms 1099-MISC.

Thus, it is possible for a taxpayer to receive section 530 relief for a subsequent year even if in a prior year it failed to file Forms 1099 (if it is otherwise entitled to section 530 relief for that year).

Accordingly, in Situation #1, Taxpayer A is not entitled to relief under section 530 for 1999 because it did not file Forms 1099-MISC for 1999. Because Taxpayer A filed Forms 1099-MISC for 2000, it may be entitled to relief under section 530 for 2000 (if it is otherwise entitled to section 530 relief for that year).

Likewise, in Situation #2, Taxpayer B is not entitled to relief under section 530 for 2000 because it did not file Forms 1099-MISC for 2000. If Taxpayer B timely files Forms 1099-MISC for 2001, it may be entitled to relief under section 530 for 2001 (if it is otherwise entitled to section 530 relief for that year).

Also, in Situation #3, Taxpayer C is not entitled to relief under section 530 for 1999 as to the workers for whom Taxpayer C did not file Forms 1099-MISC for 1999. If

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Taxpayer C timely files Forms 1099-MISC for 2000, it may be entitled to relief under section 530 for 2000 (if it is otherwise entitled to section 530 relief for that year).

When the examiner in Situation #3 determines that several of Taxpayer C's workers are employees and Taxpayer C asks the examiner if it should file Forms W-2 or Forms 1099-MISC for 2000, the examiner should tell Taxpayer C that employers are required to file Forms W-2 for employees. However, the examiner is also required by section 530(e)(1) to notify Taxpayer C that it will not owe employment taxes for the workers if it meets the requirements of section 530. The examiner must provide Taxpayer C with Publication 1976, "Independent Contractor or Employee?", which states: "Relief is not available for any year you did not file the required Forms 1099-MISC. If you filed the required Forms 1099-MISC for some workers, but not for others, relief is not available for the workers for whom you did not file Forms 1099-MISC." (The Training Materials contain an example to the same effect on page 1-7.) The examiner should also explain that the relief is only available if Taxpayer C did not treat the workers or similar workers as employees, and that if Taxpayer C provides Forms W-2, it is treating them as employees.

We hope this response is helpful to you. If there are questions, please contact this office at 202 622-6040.