



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

OFFICE OF  
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE LEGAL ADVICE

MEMORANDUM FOR AREA COUNSEL  
(SMALL BUSINESS/SELF-EMPLOYED: AREA 5)

FROM: MARIE CASHMAN  
SENIOR TECHNICIAN REVIEWER  
EMPLOYMENT TAX, BRANCH 2  
OFFICE OF THE ASSISTANT CHIEF COUNSEL  
(EXEMPT ORGANIZATIONS/EMPLOYMENT TAX/  
GOVERNMENT ENTITIES) CC:TEGE:EOEG:ET2

SUBJECT: NOTICE OF DETERMINATION OF WORKER  
CLASSIFICATION & PERIOD OF LIMITATIONS ON  
ASSESSMENT

This Chief Counsel Advice responds to your memorandum dated March 21, 2002. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be cited as precedent.

LEGEND

X =

A =

Year 1 =

Year 2 =

Year 5 =

Date 1 =

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### ISSUES

1. Whether a Tax Court petition filed when no Notice of Determination of Worker Classification (Notice of Determination) has been issued operates to suspend the period of limitations on assessment.
2. Whether the Internal Revenue Service (Service) can mail X a Notice of Determination if the X case is dismissed from the Tax Court.

### CONCLUSIONS

The mailing of a Notice of Determination is required to trigger the suspension provisions of § 6503(a) in a § 7436 proceeding. Because no Notice of Determination was mailed to X, the filing of a Tax Court petition did not have any effect on the period of limitations on assessment. The period of limitations for assessment of Federal Insurance Contributions Act (FICA) taxes is now expired. Thus, the Service cannot send X a Notice of Determination for the tax periods ending March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup>, and December 31<sup>st</sup> of Year 1 if the X case is dismissed from the Tax Court.

### FACTS

X and the Service executed a Form SS-10, Consent to Extend the Time to Assess Employment Taxes, to extend the time to assess FICA taxes until Date 1 for the tax periods ending March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup>, and December 31<sup>st</sup> of Year 1. Upon determining that A was an employee of X, the Service erroneously assessed FICA taxes without first issuing a Notice of Determination pursuant to § 7436.

X filed a petition with the Tax Court for a redetermination of employment taxes. It is not clear if X received correspondence from the Service which X mistakenly believed constituted a Notice of Determination, but no Notice of Determination has been issued to date.

### LAW AND ANALYSIS

Section 7436(a) provides that for purposes of subtitle C of the Code, the Tax Court has jurisdiction to:

- (1) review the Service's determination that one or more individuals performing services for the taxpayer are employees;

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(2) review the Service's determination that the taxpayer is not entitled to treatment under section 530(a) of the Revenue Act of 1978 with respect to those individuals; and

(3) determine the proper amount of employment tax under the above determinations.

The employment taxes imposed by subtitle C of the Code include FICA taxes under §§ 3101-3128.

After § 7436 was enacted, the Service developed a new notice, originally called a "Notice of Determination Concerning Worker Classification Under Section 7436" (see Notice 98-43, 1998-2 C.B. 207), but now called a "Notice of Determination of Worker Classification" (see Notice 2002-5, 2002-3 I.R.B. 320), to provide to taxpayers the necessary notice of its § 7436 determinations.

The Service will provide taxpayers with notice of a determination described in § 7436 by sending the taxpayer a Notice of Determination, by certified or registered mail. The Service will issue a Notice of Determination only after the Service has determined *both* that the taxpayer is not entitled to section 530 treatment and that one or more individuals performing services for the taxpayer are employees for purposes of subtitle C. The amount of employment tax under those determinations will also be determined and set forth in the Notice of Determination.

Section 7436(d)(1), which sets out the restrictions on assessment with respect to proceedings brought pursuant to § 7436, provides that the principles of subsections (a), (b), (c), (d), and (f) of § 6213, § 6214(a), § 6215, § 6503(a), § 6512, and § 7481 shall apply to proceedings brought under § 7436 "in the same manner as if the Secretary's determination described in subsection (a) [of § 7436] were a notice of deficiency." Thus, with respect to certain procedural matters that in deficiency proceedings are tied to a notice of deficiency, those matters will be tied to the "notice described in subsection (a)" of § 7436 "in the same manner as if" that notice were a "notice of deficiency."

Section 6501(a) provides that, except as otherwise provided, tax shall be assessed within 3 years after the return was filed, whether or not such return was filed on or after the date prescribed. As an exception, § 6501(c)(4) states that the Service and a taxpayer may enter into a written agreement to extend the limitations period, provided the agreement is executed before the expiration of the period of limitations prescribed by § 6501(a).

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Section 6213(a) states that within 90 days<sup>1</sup> after the notice of deficiency is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Section 6503(a)(1) suspends the running of the period of limitations on assessment in § 6501 from the time of the mailing of a notice of deficiency to a taxpayer until 60 days after the decision of the Tax Court becomes final. Thus, the mailing of a notice of deficiency gives the Tax Court jurisdiction to redetermine the proposed deficiency and suspends the period of limitations on assessment. See Smith v. Commissioner, 275 F.3d 912, 914 (10<sup>th</sup> Cir. 2001) (stating that the mailing of a notice of deficiency tolls the 3-year limitations period pursuant to § 6503(a)(1)); St. Joseph Lease Capital Corp. v. Commissioner, 235 F.3d 886, 888 (4<sup>th</sup> Cir. 2000) (articulating that the mailing of the notice of deficiency tolls of the three year statute of limitations); Scheidt v. Commissioner, 967 F.2d 1448, 1452 (10<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 1033 (1992) (recognizing that the date of *mailing* of a notice of deficiency tolls the limitations period). Moreover, when no notice of deficiency is issued to trigger any of the restrictions on assessment contained in § 6213, there is no suspension of the running of the limitations period. In Kirch v. United States, 99-1 USTC ¶ 50,452, the question of whether a tax court petition, filed before a notice of deficiency had been issued, effectively suspended the limitations period for assessment was raised. The taxpayer petitioned the Tax Court after a Form 4549 (thirty day letter) had been issued, but, before the notice of deficiency had been issued. The court held that:

On the facts of the instant case, IRC §§ 6213(a) did not restrict the secretary from making an assessment because the taxpayer did not file a petition with the tax court "for a redetermination of the deficiency." No notice of deficiency had been issued to trigger any of the restrictions on assessment contained in IRC §§ 6213. It follows that none of the provisions for suspending the running of the limitations period in IRC §§ 6503(a) could be invoked by the secretary because no "proceeding in respect of the deficiency" had been placed on the docket of the tax court. There could be no proceeding in respect of the deficiency because no notice of deficiency had been issued.

Kirch v. United States, 99-1 USTC ¶ 50,452 at 88,158 (S.D. Ohio 1999). See also Strong v. Commissioner, 96-1 USTC ¶ 50,223 (9<sup>th</sup> Cir. 1996)

In the context of a §7436 proceeding, § 7436(d)(1) provides that the Notice of Determination is treated like a notice of deficiency for purposes of §§ 6213 and 6503(a). See Notice 2002-5. The Tax Court has described each provision listed in § 7436(d)(1) and made clear that each of those deficiency procedures applies in a

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<sup>1</sup> If the notice of deficiency is addressed to the taxpayer outside the United States, the taxpayer has 150 days after the mailing in which to file a petition with the Tax Court.

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§ 7436 proceeding as if the Notice of Determination is a notice of deficiency. See Henry Randolph Consulting v. Commissioner, 112 T.C. 1 (1999). Moreover, the Service, in Notice 2002-5, has provided the following guidelines for taxpayers seeking Tax Court review of a determination under § 7436:

[T]he Notice of Determination is a jurisdictional prerequisite for seeking Tax Court review of the Service's determinations regarding worker classification, § 530 treatment, and the proper amount of employment tax under those determinations. Tax Court proceedings seeking review of these determinations may not be commenced prior to the time the Service sends the Notice of Determination by certified or registered mail.

Therefore, while the principles of §§ 6213(a) and 6503(a)(1) apply in a § 7436 proceeding, the period of limitations on assessment is not suspended until the mailing of a Notice of Determination to the taxpayer.

In the present situation, the Service has not mailed a Notice of Determination to X. Thus, the jurisdictional prerequisite for seeking Tax Court review has not been met. Consequently, the petition filed by X has no effect on the period of limitations on assessment.

With regard to whether the Service can mail a Notice of Determination to X after the case is dismissed from the Tax Court, such action is not proper because the period of limitations on assessment has already expired. Pursuant to § 6501(c)(4), the time for assessing FICA taxes was extended until Date 1 for the tax periods ending March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup>, and December 31<sup>st</sup> of Year 1. Although X petitioned the Tax Court and the case was docketed on Date 1, there was no suspension of the period of limitations on assessment; the Service did not mail a Notice of Determination to X. Thus, the period of limitations on assessment expired on Date 1. Consequently, a Notice of Determination cannot now be issued for the tax periods ending March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup>, and December 31<sup>st</sup> of Year 1.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.