

Internal Revenue Service
memorandum

LACamillo

CC:EBEO:SPR-110372-98

date: JUN 22 1998

to: Director, Office of Employment Tax Administration & Compliance
CP:EX:ST:ET

from: Assistant Chief Counsel
(Employee Benefits and Exempt Organizations) CC:EBEO

subject: I.R.C. § 7436 Procedures for Use in Employment Tax Adjustment
Program Cases

This responds to your request for assistance regarding procedures for complying with the requirements of I.R.C. § 7436 when processing cases under the Employment Tax Adjustment Program (ETAP).

As we discussed in the conference call with your office on May 4, 1998, inasmuch as ETAP cases do not involve examinations, and do not result in any determination with respect to whether the taxpayer is entitled to section 530 relief, it will be necessary to forward certain unagreed and "no response" ETAP cases to the District Director's office for examination prior to issuing a Notice of Determination Concerning Worker Classification Under Section 7436.

Accordingly, we have revised the language in the sample thirty-day letter that you provided to reflect these changes. Our revised version of the thirty-day letter is attached.

As described in the revised thirty-day letter, an immediate assessment can be made if, after receipt of the thirty-day letter, the taxpayer agrees to the proposed adjustment, and provides a signed agreement form containing the following waiver language:

I consent to the immediate assessment and collection of any additional tax and penalties. I understand that by signing this agreement, I am waiving the restrictions on assessment provided in section 7436(d) and 6213(a) of the Internal Revenue Code of 1986, and that I will not be able to contest the issues covered by this agreement in the United States Tax Court.

We have reviewed the Form 4666-A Summary of Employment Tax Adjustment that you provided. We see no problem with using the Form 4666-A as the agreement form wherein the taxpayer agrees to the proposed adjustment, provided that the above-quoted waiver language is included at the bottom of the form along with a line

PMTA: 00211


for the taxpayer's signature. However, we caution that, prior to using the Form 4666-A for this purpose, you must first remove the following boilerplate language from the bottom of the Form:

If we do not hear from you within 30 days, you will be assessed the total amount as shown above plus additional penalties and interest as applicable.

This language is no longer accurate because, pursuant to I.R.C. §§ 7436(d) and 6213(a), the Service is prohibited from making an assessment of taxes until the taxpayer has been advised of the right to contest the adjustments in Tax Court and has had an opportunity to do so or has waived the right to do so. Therefore, as noted in the revised thirty-day letter, in cases where the taxpayer does not respond to the thirty-day letter, the case will be referred to the District Director who will determine whether an examination is warranted.

The revised thirty-day letter also describes procedures for cases where the taxpayer responds to the thirty day letter but does not agree to the proposed adjustments. In those cases, the taxpayer will be given an opportunity to do one of three things: (1) mail additional information to the Service for further consideration; (2) request a telephone discussion of the proposed adjustment; or (3) request a conference with the Regional Office of Appeals. The Service will then review whatever additional information is provided and, if it appears that an adjustment is still warranted, the case will be referred to the District Director who will determine whether an examination should be opened.

Finally, we also reviewed the correspondence you forwarded from a taxpayer's representative who did not agree with adjustments proposed in an ETAP case. In the correspondence, the taxpayer's representative requests an opportunity to contest the proposed adjustment in Tax Court. You have requested guidance on how to respond to this letter and other similar situations. In our view, this case falls within the category of unagreed cases that must be referred to the District Director for a determination of whether an examination is warranted.



The attorney assigned to this matter is Lynne Camillo. She can be reached at (202) 622-6040.



MARY E. OPPENHEIMER

Attachment:
As stated

Department of the Treasury
Internal Revenue Service
P.O. Box 33605
Detroit, MI 48232

IF YOU WRITE OR CALL US, refer to
this information: 09720000-ETAP
Date of this letter: Feb 5 1998
Number of this letter: 2308CG
Taxpayer ID#: 33-0496890
Tax Year(s): 1995
Form(s): 941

For assistance, you may call us at
(313) 234-1258
ATTN: Or you may write us at the
address shown at the left.

Dear Taxpayer:

We have received information from state tax records indicating that your federal employment taxes (social security taxes, unemployment tax, and income tax withholding) as reported on your Forms [SELECT APPROPRIATE FORM NUMBER - 941, 942, 943, OR 940] may be incorrect. The reason we believe that your reported federal employment taxes may be incorrect is that [your state tax returns] OR [adjustments made by the state] show larger amounts paid to employees than are shown on your federal returns.

Our proposed adjustments based on the larger amounts paid to employees as shown on state tax records are shown on the enclosed reports (Forms 4666-A and 4667-A and/or 4668A). This is a proposed adjustment, not an examination of your federal employment tax returns. Also, because this letter simply explains a proposed adjustment, it is not a Notice of Determination Concerning Worker Classification Under Section 7436 that permits you to contest this letter in the United States Tax Court.

We understand that there may be a legal basis for the different amounts shown as payments to employees on state tax records and on your federal employment tax returns. For example, you may be entitled to relief from federal employment tax liability by reason of Section 530 of the Revenue Act of 1978. A copy of Publication 15-A explaining Section 530 is enclosed. Alternatively, state law definitions of who is an employee may differ from the federal common law standards, or the state law definition may not have been properly applied. Publication 15-A contains information about the federal common law standard. Information about state law definitions may be available from your state tax authorities.

What To Do If You Disagree

If you don't agree with our proposed adjustment, you have 30 days from the date of this letter (60 days if the letter is addressed to you outside the United States) to do one of the following:

1. Mail us the information you would like us to consider, including copies of your federal employment tax returns for the tax period(s) in question. Please include a phone number where we can reach you between 8 and 4:30 if we need additional information. Be sure to attach a copy of each of the enclosed reports (Forms 4666-A and 4667-A and/or 4668-A) to any correspondence you send us so we can identify your case. Keep the extra copies for your records.
2. Request a telephone discussion of our proposed adjustment with one of our employees who is familiar with your tax returns. To do this, please write us at the address above or call us at (313-234-1258). This is not a toll free number.
3. Request a conference with the Regional Office of Appeals. Please follow the instructions in the appeal rights information enclosed.

If we then conclude that no adjustment should be made, we will inform you of our decision. If we conclude that the adjustment may be appropriate, we will inform you that we are referring your case to the District Director, who will determine whether the adjustment should be made or whether further exploration of the facts is required.

What To Do If You Agree

If you do agree with our proposed adjustment, you may sign and return the attached Form [XX]. We will then process your case based on the adjustment(s) shown in the enclosed reports. We will bill you for the additional tax due, plus interest and any penalties that may apply. Please note that Form [XX] includes a waiver of your right to contest the proposed adjustment in the United States Tax Court. Thus, by signing Form [XX] you are giving up your right to protest the proposed adjustment in the United States Tax Court. However, you will still be able to contest the proposed adjustment in a United States District Court or the Court of Federal Claims.

In addition, if you agree with our proposed adjustment and you haven't filed Forms W-2/W-3 for the tax periods of the proposed adjustment, please send them to the IRS (not the Social Security Administration) at the address shown on this letter within 30 days from the date of this letter (60 days if addressed outside the U.S.). Please note that you should not file these Forms for any worker for whom you are entitled to relief under Section 530 as you will lose your ability to claim Section 530 relief in the future if you do so. If you have filed these forms, please send us a copy. You shouldn't show any federal income tax withheld on these forms, since no taxes were withheld

from the employees' wages. If you don't know the names of the reclassified workers, report the total amount of wages paid to those workers on a single form W-2/W-2C.

Finally, if you agree with our proposed adjustment and you have additional workers performing duties similar to those identified in the enclosed reports and you didn't pay or withhold Social Security, unemployment, or income tax withholding for them, you should correct your employment tax returns to reflect the additional tax due for those workers. You may correct your Forms 941, 942, or 943 and 940 by filing a Form 941c, an amended Form 942 or 943, or amended Form 940.

What Happens If We Don't Hear From You

If we do not hear from you within 30 days from the date of this letter (60 days if the letter is addressed to you outside the United States), we will refer your case to the District Director.

Other Information

We have enclosed several publications that will help you understand your rights as a taxpayer. These include Publication 1 (Your Rights as a Taxpayer) and an explanation of your rights to appeal this proposed adjustment.

Thank you for your cooperation.

Sincerely yours,

Chief, Currency Reporting and
Compliance Division

Enclosures:

Copy of this letter
Adjustment Reports (Forms 4666-A and 4667-A and/or 4668-A)
Publication 1
Appeal Rights
Explanations
Envelope
Publication 15-A