United States Tax Court

T.C. Memo. 2022-34

THE REDI FOUNDATION, INC.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 23715-18. Filed April 11, 2022.

Richard M. Abraham (an officer), for petitioner.

Marissa R. Lenius and *Jeremy H. Fetter,* for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

NEGA, *Judge*: The petition in this case was filed in response to a Notice of Employment Tax Determination Under Section 7436 (notice of determination) regarding petitioner's liabilities pursuant to the Federal Insurance Contributions Act (FICA) and federal income tax withholding (ITW) for the quarters ending June 30, September 30, and December 31, 2014 (periods at issue).[1] This Court has jurisdiction to review the Commissioner's determination and to decide the proper amount of federal employment tax.[2] *See* § 7436(a) (flush text). After

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[2] For convenience, we use the term "employment tax" as defined by section 7436(e) to refer to taxes under the FICA and ITW. We exclude the taxes under the Federal Unemployment Tax Act from this definition for present purposes because such liabilities are not at issue herein.

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[*2] concessions,[3] the issues for decision are: (1) whether Richard M. Abraham is an employee of petitioner for employment tax purposes for the periods at issue; (2) whether petitioner is entitled to relief from employment taxes pursuant to section 530 of the Revenue Act of 1978 (Act section 530) with respect to Mr. Abraham; and (3) whether petitioner is liable for additions to tax under section 6651(a)(1) and (2).

FINDINGS OF FACT

I. *Petitioner's Organization and Operations*

Mr. Abraham has over 40 years of experience as a real estate developer and has written multiple books on real estate development. From approximately 1973 to 1980, Mr. Abraham held seminars on real estate development throughout the country as a sole proprietor. On June 26, 1980, Mr. Abraham founded and incorporated petitioner in the Commonwealth of Massachusetts to serve as a vehicle to offer his seminars on real estate development. Mr. Abraham subsequently submitted to respondent a Form 1023, Application for Recognition of Exemption Under Section 501(c)(3), which he signed and dated July 11, 1980. Respondent granted petitioner section 501(c)(3) status and at all relevant times herein petitioner operated as a section 501(c)(3) organization. Petitioner's section 501(c)(3) status is not at issue in this case.

Mr. Abraham served as a member of the board of directors and a corporate officer of petitioner from the time of petitioner's incorporation through the periods at issue. Mr. Abraham's wife, Jacqueline, also served as a corporate officer of petitioner from the time of petitioner's incorporation through the periods at issue. Petitioner was inactive almost every year from 1980 to 2010 and offered Mr. Abraham's seminar only in 1980 and 1990. In 2010 Mr. Abraham developed an online course on real estate development which was offered to the public through petitioner. Mr. Abraham had complete control over all aspects of the online course and was its only teacher. Mr. Abraham frequently worked over 60 hours a week on matters related to the online course, including instruction and mentoring students. Petitioner's only activity during the periods at issue was the online course. Petitioner's sole source of income during the periods at issue was from tuition charged for

[3] Respondent concedes that petitioner is not liable for penalties under section 6656 for the periods at issue on account of respondent's employee's failure to execute the required supervisory approval form for such penalties. *See* § 6751(b).

[*3] enrollment in the online course. Mr. Abraham regarded petitioner as a mere vehicle to offer the online course and testified that petitioner was indistinguishable from himself.

Mr. Abraham was compensated by petitioner pursuant to an unwritten contract that purportedly required petitioner to pay Mr. Abraham on the basis of overall student enrollment in the online course. Petitioner did not disclose the terms of this unwritten contract.

II. *Petitioner's Tax Reporting*

Petitioner filed a Form 990, Return of Organization Exempt From Income Tax, for the tax year ending May 31, 2015, on June 9, 2015. On its Form 990 petitioner reported total revenue of $255,605 and salaries, other compensation, and employee benefits of $91,918. Mr. Abraham signed petitioner's Form 990 in the box provided for the signature of the officer and identified himself thereunder as petitioner's treasurer. Petitioner issued Mr. Abraham a Form 1099–MISC, Miscellaneous Income, which reported that petitioner paid Mr. Abraham $91,918 during 2014. Mr. Abraham received from petitioner a total of $120,000 during the periods at issue in 2014. Petitioner did not file a Form 941, Employer's Quarterly Federal Tax Return, for any of the periods at issue. Respondent subsequently prepared substitutes for returns (SFRs) pursuant to section 6020(b) for the Forms 941 that were not filed for the periods at issue. From petitioner's incorporation to the present, petitioner did not file any employer tax returns reporting any payments to Mr. Abraham as salary or wages for services provided by or on behalf of petitioner as an employee.

III. *Employment Tax Examination and Notice of Determination*

Respondent selected petitioner's Form 990 return for employment tax examination for the periods at issue. By letter dated May 1, 2018, respondent mailed a Form 4564, Information Document Request, to petitioner in connection with petitioner's treatment of Mr. Abraham as an independent contractor. In that same letter, respondent also requested that petitioner provide information on whether it had met the requirements under Act section 530 for employment tax relief. In response petitioner sent a letter dated May 9, 2018, in which it asserted that Mr. Abraham was never an employee of petitioner and that Act section 530 relief was thus inapplicable to petitioner's circumstances.

Following the employment tax examination, respondent mailed to petitioner the notice of determination dated October 12, 2018. The

[*4] notice of determination determined that Mr. Abraham was to be legally classified as an employee for purposes of Federal employment taxes and that petitioner was not entitled to relief from that classification under Act section 530 with respect to Mr. Abraham for the periods at issue. Enclosed with the notice of determination was a schedule setting forth petitioner's employment tax liabilities, as well as additions to tax under section 6651(a)(1) and (2) and penalties under section 6656. On November 30, 2018, petitioner timely filed a petition disputing both respondent's determination of Mr. Abraham's classification as an employee and all related tax liabilities. Petitioner's principal place of business when the petition was filed was in Boca Raton, Florida.

OPINION

I. *Burden of Proof*

The Commissioner's determinations are presumed correct, and the taxpayer bears the burden of proving that they are incorrect. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). This principle applies to the Commissioner's determinations that a taxpayer's workers are employees. *See Ewens & Miller, Inc. v. Commissioner*, 117 T.C. 263, 268 (2001) (citing *Boles Trucking, Inc. v. United States*, 77 F.3d 236, 239–40 (8th Cir. 1996)). As a corporation, petitioner also bears the burden of proving that it is not liable for additions to tax under section 6651(a)(1) and (2). *See NT, Inc. v. Commissioner*, 126 T.C. 191, 194–95 (2006).

II. *Classification of Mr. Abraham for Employment Tax Purposes*

Subtitle C of the Code governs payment of employment taxes. In particular, section 3111 imposes taxes on employers under FICA (pertaining to Social Security) based on wages paid to employees. The term "wages" as used in these statutes generally encompasses "all remuneration for employment." §§ 3121(a), 3401(a). "Employee" is defined for purposes of employment taxes to include "any officer of a corporation." § 3121(d)(1). The regulations clarify the scope of the inclusion for corporate officers as follows:

> Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive,

[*5] directly or indirectly, any remuneration is considered not to be an employee of the corporation.

Treas. Reg. §§ 31.3121(d)-1(b), 31.3401(c)-1(f).

The text of the regulations thus recognizes a longstanding exception from employee status for officers who (1) perform "only minor services" and (2) do not receive and are not entitled to receive remuneration for those services. *See United States v. Bernstein*, 179 F.2d 105, 109 (4th Cir. 1949) (finding officers not to be employees where "[w]hat little services they performed were of a minor or nominal nature having no material bearing or effect upon the functioning of the corporation in the conduct of its business"). In interpreting the regulations, the courts and the Commissioner have also recognized that a corporate officer can operate in dual capacities as both a statutory employee and an independent contractor—if the evidence shows that clear distinctions were drawn between the dual roles. *See Idaho Ambucare Ctr., Inc. v. United States,* 57 F.3d 752, 757 (9th Cir. 1995) (concluding that taxpayer failed to show distinction between officer's official duties and his services as doctor and administrator); *W. Mgmt., Inc. v. United States*, 45 Fed. Cl. 543, 552 (2000) (concluding that attorney's duties and compensation as officer and as attorney were "interrelated and intermingled" and "cannot be separated out into separate roles"); *cf.* Rev. Rul. 58-505, 1958-2 C.B. 728 (finding dual capacity where insurance company's corporate officers performed administrative duties and separate insurance salesman services under a standard sales agent contract). But when services performed by a corporate officer are responsible for the entirety of a corporate taxpayer's income and that corporate officer receives remuneration for those services, this Court has concluded that such an officer is properly considered a statutory employee. *See Joseph M. Grey Pub. Acct., P.C. v. Commissioner*, 119 T.C. 121, 130 (2002), *aff'd*, 93 F. App'x 473 (3d Cir. 2004); *see also Veterinary Surgical Consultants, P.C. v. Commissioner,* T.C. Memo. 2003-48, 2003 WL 548572, *aff'd*, 90 F. App'x 669 (3d Cir. 2004).

The record establishes that Mr. Abraham provided services for petitioner that constituted its entire source of income and received remuneration for those services; as respondent suggests, it is a "fair inference" that Mr. Abraham did so as an officer and statutory employee. *Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 130. Seeking to avoid Mr. Abraham's being tagged with statutory employee status, petitioner responds with a three-pronged argument. First, petitioner asserts that

[*6] Mr. Abraham performed services in dual capacities, both as an officer-employee and as an independent contractor. Second, petitioner argues that the scope of Mr. Abraham's employment as an officer was limited to only minor administrative duties for which he received no remuneration, thereby coming within the minor services exception of Treasury Regulation § 31.3121(d)-1(b). Third, with regard to the services Mr. Abraham provided in connection with the online course, petitioner contends that Mr. Abraham cannot be its employee because petitioner exercised no control over him or the online course. In support, petitioner emphasizes that under the Internal Revenue Service's 20-factor analysis and the common law rules for determining the existence of an employer-employee relationship, the employer must have the right to control the details of work performed by its employee.[4] *See* Rev. Rul. 87-41, 1987-1 C.B. 296, 298–99. Petitioner emphatically rejects the argument that it had the right to exercise control over Mr. Abraham in any capacity. Finally, petitioner asserts that the payments to Mr. Abraham constituted royalty payments for the use of his real estate book in the online course.

We begin by quickly dispensing with this final argument from petitioner. Given the weight of the evidence establishing that Mr. Abraham provided extensive services to the corporation and received payments in the nature of compensation for those services, we do not accept petitioner's self-serving characterization of the payments as royalties. *See Charlotte's Office Boutique, Inc. v. Commissioner*, 121 T.C. 89, 106 (2003) ("[W]e do not believe that [a taxpayer] can avoid the payment of Federal employment taxes simply by declaring that she will be paying royalties to herself through a controlled corporation for its use of that property."), *supplemented by* T.C. Memo. 2004-43, *aff'd*, 425 F.3d 1203 (9th Cir. 2005).

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[4] Petitioner does not cite specific caselaw in support of this contention but broadly asserts that common law precedent does not allow for an employee designation under present circumstances. This Court's formulation of the test for whether an employer-employee relationship exists considers the following factors: (1) the degree of control exercised by the principal over the worker; (2) which party invests in work facilities used by the worker; (3) the worker's opportunity for profit or loss; (4) whether the principal has the right to discharge the worker; (5) whether the work is part of the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties believed they were creating. *See, e.g.*, *Ewens & Miller, Inc.*, 117 T.C. at 270; *see also Weber v. Commissioner*, 103 T.C. 378, 387 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995).

[*7] Turning next to petitioner's initial argument, we find that petitioner has pointed to no credible evidence that Mr. Abraham worked for or was engaged by petitioner in a capacity other than as an officer. *See Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 130; Rev. Rul. 82-83, 1982-1 C.B. 151, 152 (stating that an officer's potential dual capacity is "a question of fact" and concluding that officer was statutory employee when duties involved "fundamental decisions regarding the operation of the corporation"). The only items in the record that could suggest a separate independent contractor relationship are the Form 1099–MISC reporting nonemployee compensation and Mr. Abraham's own testimony that he served petitioner in a dual capacity. Without support from other evidence—such as a written service contractor agreement between petitioner and Mr. Abraham—the Form 1099–MISC and the self-serving testimony are entitled to little evidentiary weight and cannot sustain petitioner's burden. *See Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 130; *see also Blossom Day Care Centers, Inc. v. Commissioner*, T.C. Memo. 2021-86, at *13–14; *Cent. Motorplex, Inc. v. Commissioner*, T.C. Memo. 2014-207, at *9; *Veterinary Surgical Consultants, P.C. v. Commissioner*, 2003 WL 548572, at *7.

Mr. Abraham was the sole person in charge of overseeing and executing the online course (petitioner's only business activity); he necessarily provided a wide variety of services to petitioner, including managerial decisions about the content, marketing, and enrollment of the online course. *See Joseph M. Grey Pub. Acct., P.C.,* 119 T.C. at 129–30 & n.7 (rejecting dual capacity argument where officer was sole provider of managerial and accounting services to petitioner, and stating that "fundamental decisions regarding the operation of the corporation . . . are customarily made by corporate officers or other employees" (quoting *Van Camp & Bennion v. United States*, 251 F.3d 862, 866 (9th Cir. 2001))); *see also Spicer Acct., Inc. v. United States*, 918 F.2d 90, 95 (9th Cir. 1990) ("[A] corporation's sole full-time worker must be treated as an employee."). On the record before us, we see no clear distinction between Mr. Abraham's role as a corporate officer and his provision of services to the corporation. We conclude that petitioner has failed to carry its burden of establishing that Mr. Abraham was engaged in dual roles as both an employee and an independent contractor.

Having determined that Mr. Abraham did not provide clearly distinct services as an independent contractor, we turn to whether Mr. Abraham's employment falls within the minor services exception. The record is clear that Mr. Abraham performed significantly more than "minor services" for petitioner. Mr. Abraham worked on all aspects of

[*8] the online course, which was petitioner's only activity and source of income during the periods at issue. *See Yeagle Drywall Co. v. Commissioner*, 54 F. App'x 100, 103 (3d Cir. 2002) (finding that an officer's services "were anything but minor inasmuch as he was the only source of revenue" for the corporation), *aff'g* T.C. Memo. 2001-284 *and Veterinary Surgical Consultants, P.C. v. Commissioner*, 117 T.C. 141 (2001); *Nu-Look Design, Inc. v. Commissioner*, T.C. Memo. 2003-52, 2003 WL 548583, at *6–7 (concluding corporate officer was statutory employee where he "worked in all significant aspects of petitioner's business operations"), *aff'd*, 356 F.3d 290 (3d Cir. 2004). Mr. Abraham often devoted more than 60 hours per week to work on the course during the periods at issue and was the sole teacher of the course. *Cf. Glass Blocks Unlimited v. Commissioner*, T.C. Memo. 2013-180, at *8 (concluding that corporate officer was statutory employee where he was the "sole full-time worker" and "performed substantially all of the work necessary to operate the business"). Petitioner purportedly compensated Mr. Abraham pursuant to an unwritten contract requiring petitioner to pay Mr. Abraham on the basis of the number of students enrolled in the online course. During 2014, the year covering the periods at issue, petitioner paid Mr. Abraham $120,000 for his services. The overwhelming weight of the evidence shows that the services Mr. Abraham provided to petitioner were far more than minor; petitioner cannot avail itself of the exception in Treasury Regulation §§ 31.3121(d)-1(b) and 31.3401(c)-1(f).

Petitioner's final contention that Mr. Abraham cannot be its employee because petitioner could not control Mr. Abraham is also unpersuasive. The right to control is a common law classification factor, and petitioner's attempt to rely on it as determinative of statutory employee status is misplaced. *See, e.g.*, *Yeagle Drywall Co. v. Commissioner*, 54 F. App'x at 103 (concluding that officers' statutory employee status "obviat[ed] any reason to analyze whether they are employees under the usual common law rules"); *W. Mgmt, Inc.*, 45 Fed. Cl. at 553 ("Having concluded that [the officer] was a statutory employee . . . , the court does not reach the issue of whether [the officer] was also a common law employee."). Indeed, to accept an assertion that the primary corporate officer and founder of petitioner could not exercise control over his own activities performed for the corporation is illogical. *Veterinary Surgical Consultants, P.C. v. Commissioner,* 2003 WL 548572, at *7; *see Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 128–29. In operating his real estate course through the corporate vehicle of petitioner, Mr. Abraham chose to accept both the benefits and the burdens of the corporate form, including its separate tax identity. *See*

[*9] *Moline Props., Inc. v. Commissioner*, 319 U.S. 436, 438–40 (1943). Respecting the distinctness of that corporate form means that we must carefully scrutinize payments made by a closely held corporation to an officer who performs substantial services, regardless of the characterization of the payments by the corporation. *See Spicer Acct., Inc.*, 918 F.2d at 92–93 (deeming corporate officer performing substantial services to be an employee and thus holding dividend payments constituted wages subject to employment tax); *Joseph Radtke, S.C. v. United States*, 895 F.2d 1196, 1197 (7th Cir. 1990) (per curiam); *see also Glass Blocks Unlimited*, T.C. Memo. 2013-180, at *8–9. As this Court stated in *Veterinary Surgical Consultants, P.C.*, the tax law "does not permit a taxpayer to use his or her dual role as a shareholder of and service provider to a corporation as grounds for ignoring the legal ramifications of the business construct so selected," such as the imposition of federal employment taxes on wages. *Veterinary Surgical Consultants, P.C. v. Commissioner*, 2003 WL 548572, at *7 (citing *Moline Props., Inc. v. Commissioner*, 319 U.S. at 438–39). We conclude that Mr. Abraham satisfies the definition of statutory employee under section 3121(d)(1).

Petitioner also makes an alternative argument that it is entitled to relief under Act section 530[5] because it had a reasonable basis for treating Mr. Abraham as an independent contractor due to a purportedly longstanding industry practice. But it is well settled by this Court that the scope of Act section 530 relief is limited to common law worker classification determinations. *See Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 132; *see also Charlotte's Office Boutique*, 121 T.C. at 109 n.10. In providing Act section 530 relief, Congress did not intend for relief to be available in situations where an individual—such as a corporate officer—was already classified as an employee by statute.[6] *See Joseph M. Grey Pub. Acct., P.C.*, 119 T.C. at 132–33 (analyzing legislative history and concluding that section 530 relief was not

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[5] Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2885 (amended by the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1122, 110 Stat. 1755, 1766–68).

[6] With *certain limited statutory exceptions*, the classification of particular workers or classes of workers as employees . . . for purposes of Federal employment taxes must be made under common law rules. . . . The bill provides an interim solution for controversies between the [IRS] and taxpayers involving whether certain individuals are employees *under interpretations of the common law* . . . .

H. R. Rep. No. 95-1748, at 3, 4 (1978) (emphasis added).

[*10] available for statutory employees). Because we conclude that Mr. Abraham is a statutory employee under section 3121(d)(1), Act section 530 relief is not available to petitioner. *See, e.g.*, *Loughman v. Commissioner*, T.C. Memo. 2018-85, at *11–12; *Donald G. Cave A Pro. Law Corp. v. Commissioner*, T.C. Memo. 2011-48, 2011 WL 802696, at *13, *aff'd per curiam*, 476 F. App'x 424 (5th Cir. 2012).

III. *Additions to Tax Under Section 6651(a)(1)*

Respondent determined that for each period at issue petitioner is liable for an addition to tax under section 6651(a)(1) for failure to timely file required employment tax returns. Section 6651(a)(1) provides for an addition to tax for failure to timely file a return equal to 5% of the tax required to be shown on the return for each month or fraction thereof for which there is a failure to file, not to exceed 25%. A taxpayer is not liable for an addition to tax under section 6651(a)(1) if the failure to timely file was due to reasonable cause and not due to willful neglect. *United States v. Boyle*, 469 U.S. 241, 245–46 (1985). To show reasonable cause, the taxpayer must show that it could not file the return on time even though it exercised ordinary business care and prudence. *See Crocker v. Commissioner*, 92 T.C. 899, 913 (1989); Treas. Reg. § 301.6651-1(c)(1). Reliance on a tax professional can constitute reasonable cause if that professional advises the taxpayer on a substantive tax issue, such as whether a liability exists or a return must be filed. *Boyle*, 469 U.S. at 250–51. In contrast, willful neglect means a "conscious, intentional failure or reckless indifference" by the taxpayer. *Id.* at 245.

Employers must report employment taxes on Forms 941. Treas. Reg. § 31.6011(a)-1(a)(1). The parties agree that petitioner did not file Form 941 for any period at issue.

Petitioner has not argued that it had reasonable cause and has submitted no credible evidence that it exercised ordinary business care and prudence in its failure to file Forms 941. While petitioner made vague allusions in its posttrial briefs to having previously consulted with tax counsel regarding the tax treatment of Mr. Abraham, such statements are insufficient to establish reasonable cause when unsupported by evidence. *See, e.g.*, *Ramirez v. Commissioner*, T.C. Memo. 2007-346 (finding no reasonable cause for failure to file employment tax returns where taxpayer did not call his return preparer as witness nor establish that he "sought specific advice" or provided "all relevant information regarding the nature of [workers'] employment" to

[*11] his preparer); *see also Charlotte's Office Boutique*, 121 T.C. at 110–11. Accordingly, we find that petitioner is liable for the addition to tax under section 6651(a)(1) for each of the periods at issue.

IV. *Additions to Tax Under Section 6651(a)(2)*

Section 6651(a)(2) imposes an addition to tax for failure timely to pay the amount shown as tax on a return. Respondent introduced evidence that he prepared an SFR for each of the periods at issue pursuant to section 6020(b). An SFR constitutes "the return filed by the taxpayer" for purposes of determining the amount of an addition to tax under section 6651(a)(2). *See* § 6651(g)(2). The record also establishes that petitioner did not pay the amount shown as tax on the SFRs.

Again, for the same reasons discussed *supra*, petitioner has not established that its failure to timely pay was due to reasonable cause and not willful neglect. *See* § 6651(a)(2). Accordingly, petitioner is liable for the addition to tax under section 6651(a)(2).

To reflect the foregoing,

Decision will be entered for respondent.