

United States Tax Court

T.C. Memo. 2022-38

TREECE INVESTMENT ADVISORY CORP.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 21015-19.

Filed April 19, 2022.

Mark M. Mockensturm and *Blanca N. Wheeler*, for petitioner.

Gabriel J. Minc, for respondent.

MEMORANDUM OPINION

KERRIGAN, *Judge*: This case is before the Court on respondent's Motion to Partially Dismiss for Lack of Jurisdiction and petitioner's Motion for Summary Judgment. Respondent contends that this Court lacks jurisdiction in this employment tax case to review respondent's determination that the Voluntary Classification Settlement Program (VCSP) does not apply to the computation of petitioner's employment tax liabilities. Petitioner contends that it met all the requirements of the VCSP and respondent does not have the discretion to deny its participation in the VCSP.

Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

On October 10, 2019, respondent sent Treece Investment Advisory Corp. a Letter 3523, Notice of Employment Tax Determination Under Section 7436 (notice), reclassifying Dock D. Treece as an

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[*2] employee instead of an independent contractor for tax years 2015, 2016, and 2017 (years in issue). In the notice respondent determined additions to tax pursuant to section 6651(a) and penalties pursuant to section 6656 for the years in issue. On September 13, 2021, the parties filed a Stipulation of Settled Issues which resolved all but one issue. The remaining issue is the proper amounts of employment taxes, which petitioner seeks to have computed in accordance with respondent's VCSP.

The parties stipulated that Mr. Treece was the sole corporate officer of petitioner for the years in issue. They further stipulated that he was an employee and not an independent contractor for the years in issue. The parties also stipulated that petitioner is not entitled to relief under the Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885, as amended, with respect to Mr. Treece's treatment as an independent contractor.

Pursuant to the Stipulation of Settled Issues petitioner owes the following employment taxes:

<i>Tax period</i>	<i>Return form number</i>	<i>Type of tax</i>	<i>Amount of tax</i>
3/31/15-12/31/15	941	FICA & FITW	\$13,278
2015	940	FUTA	420
3/31/16-12/31/16	941	FICA & FITW	15,809
2016	940	FUTA	420
3/31/17-12/31/17	941	FICA & FITW	18,348
2017	940	FUTA	420
Total			\$48,695

These amounts are subject to reduction if petitioner qualifies for the VCSP.

Respondent abated additions to tax pursuant to section 6651(a) and penalties pursuant to section 6656.

Background

There is no dispute as to the following facts drawn from the parties' motion papers, affidavits, and attached exhibits. When the Petition was timely filed, petitioner was a corporation with its

[*3] principal place of business in Ohio. Mr. Treece is a principal of petitioner.

The VCSP provides partial relief from federal employment taxes for eligible taxpayers that agree to treat workers prospectively as employees. I.R.S. Announcement 2012-45, 2012-51 I.R.B. 724, 724. To be eligible for the VCSP, a taxpayer must: (1) have consistently treated the workers as nonemployees; (2) have filed all required Forms 1099, consistent with the nonemployee treatment, for the previous three years; and (3) not currently be under employment tax audit by the Internal Revenue Service (IRS). *Id.* Petitioner submitted Form 8952, Application for Voluntary Classification Settlement Program (VCSP), on October 23, 2018. Respondent denied petitioner participation in the VCSP on February 28, 2019, stating: “You’re under an employment tax examination by the IRS.”

Discussion

We will first decide respondent’s Motion to Partially Dismiss. If we determine that we have jurisdiction, we will then address petitioner’s Motion for Summary Judgment.

I. Respondent’s Motion to Partially Dismiss

The Tax Court may exercise jurisdiction only to the extent expressly provided by Congress. *See* § 7442; *Breman v. Commissioner*, 66 T.C. 61, 66 (1976). We, however, have the authority to determine whether we have jurisdiction over a particular case. *Kluger v. Commissioner*, 83 T.C. 309, 314 (1984). Generally, we have jurisdiction under section 7436(a) to determine: (1) whether an individual providing services to a person is that person’s employee for purposes of subtitle C; (2) whether the person, if an employer, is entitled to relief under section 530 of the Revenue Act of 1978; and (3) the proper amounts of employment taxes which relate to the Commissioner’s determination concerning worker classification.

This Court’s deficiency jurisdiction includes reviewing administrative determinations that are necessary to determine the merits of the deficiency determinations. *See Treece Fin. Servs. Grp. v. Commissioner*, No. 20850-19, 158 T.C., slip op. at 4 (Apr. 19, 2022); *see also, e.g., Trimmer v. Commissioner*, 148 T.C. 334, 345–48 (2017) (holding that the Tax Court has jurisdiction in a deficiency proceeding to review the Commissioner’s denial of the taxpayer’s request for a hardship waiver of the 60-day rollover requirement under section

[*4] 402(c)(3)(B)); *Capitol Fed. Sav. & Loan Ass'n & Sub. v. Commissioner*, 96 T.C. 204, 214–15 (1991) (holding that the Commissioner's refusal to process an application for an accounting method change under section 446(b) is subject to judicial review in a deficiency proceeding); *Mailman v. Commissioner*, 91 T.C. 1079, 1083 (1988) (holding that the Commissioner's denial of waiver of the addition to tax under former section 6661 is subject to judicial review in a deficiency proceeding); *Estate of Gardner v. Commissioner*, 82 T.C. 989, 1000 (1984) (holding that the Commissioner's denial of a request under section 6081(a) to extend the time for filing of an estate tax return is subject to judicial review in a deficiency proceeding). Under section 7436(d), the principles of sections 6213(a), (b), (c), (d) and (f), 6214(a), 6215, 6503(a), 6512, and 7481 apply to cases that arise under section 7436, as if the Secretary's notice of determination was a notice of deficiency. *Charlotte's Office Boutique, Inc. v. Commissioner*, 121 T.C. 89, 103 n.8 (2003), *supplemented by* T.C. Memo. 2004-43, *aff'd*, 425 F.3d 1203 (9th Cir. 2005).

There is a strong presumption that an act of administrative discretion is subject to judicial review. *Trimmer*, 148 T.C. at 346; *Corbalis v. Commissioner*, 142 T.C. 46, 56 (2014) (holding that denials of interest suspension under section 6404(h) are subject to judicial review). Under the VCSP, an eligible employer pays a lesser amount of employment tax than would have been due as to certain employees and is not liable for any interest and penalties. *See* I.R.S. Announcement 2012-45, 2012-51 I.R.B. at 725. In 2000 section 7436(a) was amended to provide the Tax Court jurisdiction to “determine whether such a determination by the Secretary is correct and the proper amount of employment tax under such determination.” *See* Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 314(f), 114 Stat. 2763, 2763A-643 (2000); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3103, 112 Stat. 685, 731. The U.S. Court of Appeals for the Ninth Circuit held that the amendment in 2000 “indicates that Congress did not intend to limit the Tax Court's jurisdiction under section 7436 to determining only whether an individual was an employee.” *Charlotte's Office Boutique, Inc. v. Commissioner*, 425 F.3d at 1208.

Pursuant to statute and caselaw we conclude that this Court has jurisdiction to determine whether the liability is correct in proceedings for determination of employment status. *See* § 7436(a); *see also* *Ewens & Miller, Inc. v. Commissioner*, 117 T.C. 263, 267–68 (2001). Because the denial of taxpayer eligibility for VCSP directly affects the amounts of

[*5] tax, the procedures that Congress has establish for judicial review of the Commissioner's determinations logically contemplate review of such a denial as one element of the determination. *See Trimmer*, 148 T.C. at 347; *Estate of Gardner*, 82 T.C. at 996.

We conclude that we have jurisdiction to determine whether the VCSP enters into the computation of petitioner's taxes.¹ *See Treece Fin. Servs. Grp.*, 158 T.C., slip op. at 5. We will deny respondent's motion.

II. *Petitioner's Motion for Summary Judgment*

Summary judgment may be granted where the pleadings and other materials show that there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party to demonstrate that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. *FPL Grp., Inc. & Subs. v. Commissioner*, 116 T.C. 73, 74–75 (2001). After reviewing the pleadings and the motion with accompanying exhibits and declarations, we conclude that there is a material dispute regarding the facts.

Petitioner contends that it has met all requirements for participation in the VCSP. Respondent contends that Mr. Treece's misclassification as a nonemployee was uncovered as the result of an employment tax audit. If respondent's argument is correct, petitioner does not meet the participation requirements of VCSP. We conclude that whether there was an employment tax audit is a dispute of material fact, and therefore we will deny petitioner's Motion for Summary Judgment.

Any contentions we have not addressed are irrelevant, moot, or meritless.

To reflect the foregoing,

An appropriate order will be issued.

¹ Our review in this case is not contrary to our general policy of not looking behind a statutory notice of determination to examine the Commissioner's motives or conduct in determining a liability because our review is necessary to determine the merits of the Commissioner's determinations. *Estate of Gardner*, 82 T.C. at 1000.