Department of the Treasury	Internal Revenue Service	**Office of Chief Counsel**	**Notice**

CC-2001-004
UIL 7436.01-05

January 16, 2001

Subject: Change in Litigating Position   **Cancel Date:** January 16, 2002

The purpose of this Notice is to inform all Chief Counsel attorneys and managers that as a result of the statutory amendment to I.R.C. § 7436 made by section 314(f) of the Omnibus Budget Act, P.L. 106-554, 114 Stat. 2763, ___ , our position on the scope of the Tax Court's jurisdiction in Employment Status Proceedings under I.R.C. Section 7436 has changed. This change necessitates the immediate review of pending employment status cases under   I.R.C. § 7436.

Our prior position, which was based on the original statutory language and was adopted by the Tax Court in Henry Randolph Consulting v. Commissioner, 112 T.C. 1 (1999), was that the Tax Court had jurisdiction to determine only two matters: (1) whether workers were employees for purposes of employment tax and (2) whether the petitioner was entitled to treatment under section 530(a) of the Revenue Act of 1978. See Notice 98-43, 1998-33 I.R.B. 13.

On December 21, 2000, section 314(f) of the Omnibus Budget Act added to I.R.C. § 7436(a) the language indicated below in bold:

(a) Creation of remedy. If, in connection with an audit of any person, there is an actual controversy involving a determination by the Secretary as part of an examination that–

(1) one or more individuals performing services for such person are employees of such person for purposes of subtitle C, or

(2) such person is not entitled to the treatment under subsection (a) of section 530 of the Revenue Act of 1978 with respect to such an individual, upon the filing

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of an appropriate pleading, the Tax Court may determine whether such a determination by the Secretary is correct **and the proper amount of employment tax under such determination**. Any such redetermination by the Tax Court shall have the force and effect of a decision of the Tax Court and shall be reviewable as such.

The amendment is effective retroactively to August 5, 1997. See § 314(g), Omnibus Budget Act.

In light of this statutory change, the position of Chief Counsel now is that in addition to the two determinations explicitly addressed in I.R.C. § 7436(a)(1) (worker status) and (2) (§ 530 treatment), the Tax Court also has jurisdiction to determine the proper amount of employment tax that relates to those two determinations.

This office is preparing further guidance concerning the new statute and handling of employment status cases.

In the meantime, any area counsel attorney who has a pending employment status case under I.R.C. § 7436(a) with any one of the following situations should contact the TE/GE employment tax attorney assigned to that case (on Case Screen 2 of TL-CATS) immediately:

1. A decision document was entered by the Tax Court after September 21, 2000.

2. Any document is due to be filed with the Tax Court by February 28, 2001.

3. A case is calendared for trial before April 2, 2001.

If a situation exists in a case that is not listed above, but requires immediate attention, please contact the employment tax attorney assigned to the case.

In addition, attorneys who are not in TE/GE should contact the TE/GE employment tax attorney concerning all employment status cases in their inventory.

If no TE/GE employment tax attorney has been assigned (on Case Screen 2 of TL-CATS) in a docketed case, or if there are questions concerning a nondocketed case, please contact Paul Carlino (CC:TEGE:EOEG:ET1) at (202) 622-6040.

        /s/
      Sarah Hall Ingram
      Division Counsel/
        Associate Chief Counsel
        Tax Exempt and
        Government Entities