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Treece Financial Services Group,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 20850-19

Motion for Partial Summary Judgment

SERVED 10/19/21

UNITED STATES TAX COURT

TREECE FINANCIAL SERVICES)	
GROUP,)	
)	
Petitioner,)	
)	
v.)	Docket No. 20850-19
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	Filed Electronically
)	
Respondent.)	

RESPONDENT’S PARTIAL MOTION TO DISMISS

RESPONDENT MOVES, pursuant to Tax Court Rule 53, for a dismissal in respondent’s favor, due to a lack of jurisdiction of this Court, of petitioner’s claim that petitioner is entitled to a settlement of petitioner’s employment tax liabilities under respondent’s Voluntary Classification Settlement Program (“VCSP”).

IN SUPPORT THEREOF, respondent respectfully states:

1. The petition in this case was filed on November 25, 2019. Attached to the petition is a Notice of Employment Tax Determination under Internal Revenue Code (IRC) Section 7436 issued by respondent to petitioner on October 10, 2019 (hereinafter referred to as the “Notice”).

2. The Notice asserts that, for the 2015, 2016 and 2017 tax years, petitioner misclassified an individual, Dock D. Treece, as an independent contractor rather than an employee.

3. The Notice further alleges petitioner is not entitled to relief under Section 530 of the Revenue Act of 1978 with respect to such misclassification.

4. Additionally, the Notice states that, as a consequence of the misclassification, petitioner owes employment taxes for the 2015, 2016 and 2017 tax years in a total amount for all three years equal to \$18,561.68.

5. The Notice also asserts penalties under IRC section 6651(a) (Failure to File Tax Return or to Pay Tax) and section 6656 (Failure to Deposit).

6. On September 13, 2021, the parties filed a Stipulation of Settled Issues (hereinafter referred to as the “Stipulation”) with the Court, in which the parties agreed that, for the 2015, 2016 and 2017 tax years:

(a) Dock D. Treece was misclassified as an independent contractor rather than an employee;

(b) Petitioner is not entitled to relief under section 530 of the Revenue Act of 1978 with respect to such misclassification; and

(c) As a consequence of the misclassification, petitioner owes employment taxes for the 2105, 2016 and 2017 tax years in a total amount for all three years equal to \$18,561.68.

7. The Stipulation further states that respondent agrees to abate all additions to tax under IRC section 6651(a) and penalties under IRC section 6656 asserted in the Notice.

8. Paragraph 7 of the Stipulation states the only remaining issue in this case is whether petitioner is entitled to a settlement of the liability described in paragraph 4, above, of this Motion (i.e., petitioner owes employment taxes for the 2015, 2016 and 2017 tax years in a total amount for all three years equal to \$18,561.68) under respondent's Voluntary Classification Settlement Program (VCSP) described in IRS Internal Revenue Manual (IRM) 4.23.6.

9. Paragraph 7 of the Stipulation further provides:

(a) Respondent believes this Court does not have jurisdiction to review respondent's determination that petitioner is not eligible for the VCSP; and

(b) Petitioner believes this Court has jurisdiction and the authority to review respondent's determination and compel respondent to follow its rules and procedures as it relates to petitioner's eligibility for the VCSP.

10. In Support of this Motion, respondent avers that, as a matter of law, this Court lacks jurisdiction to review respondent's determination that petitioner is not eligible for settlement under respondent's VCSP for the following reasons:

(a) The Anti-Injunction Act contains a broad prohibition on suits to restrain the assessment or collection of taxes. IRC section 7421(a) provides that, subject to enumerated and very limited exceptions that are inapplicable in this case, “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed.” In this case, the amount of petitioner’s employment tax liabilities has been settled and, therefore, this Court lacks jurisdiction to restrain the assessment or collection of such taxes.

(b) Under Tax Court Rule 210, declaratory judgment actions may only be sought in enumerated and very limited circumstances that are inapplicable in this case. Tax Court Rule 210 is consistent with IRC section 7428, which generally only allows federal court jurisdiction with respect to declaratory judgment actions relating to the status and classification of certain tax-exempt organizations. Section 210 of the Tax Court Rules is also consistent with the Declaratory Judgment Act, 28 U.S.C. section 2201(a), which authorizes federal courts to issue declaratory judgments, except with respect to federal taxes other than actions brought under IRC section 7428. In this case, petitioner is effectively seeking a declaratory judgment that

petitioner is entitled to a favorable settlement under respondent's VCSP. In accordance with Tax Court Rule 210, this Court does not have jurisdiction to provide such a judgment.

(c) Under 28 U.S.C. section 1361, the federal district courts have jurisdiction of actions in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. However, other than as regards declaratory judgements, as discussed above, there is no similar action that may be brought in the U.S. Tax Court. Even if jurisdiction of such a cause of action existed in the Tax Court, an action in mandamus is only available in cases in which the Government owes a plaintiff a clear nondiscretionary duty. Wilbur v. United States ex rel. Kadvie, 281 U.S. 206, 218 (1930) (stating that mandamus may not be employed "to direct the exercise of judgment or discretion in a particular way"); In re 1900 M Restaurant Associates, Inc. v. U.S., 319 B.R. 302 (2005), citing Carroll v. IRS, 14 AFTR2d 5564, 64-2 USTC par. 987 (E.D.N.Y. 1964) (stating that the decision to accept or reject a compromise offer by its nature involves the discretion of administrative authority and can not be compelled by any action for a mandatory injunction"). In this case, IRS Announcement 2011-64 and IRS

Announcement 2012-45 are absolutely clear that the IRS retains discretion whether to accept a taxpayer's application to the VCSP. In the present case, petitioner's application for a VCSP settlement was explicitly denied. No taxpayer, including petitioner, has an absolute right to a settlement under the VCSP and respondent has no clear nondiscretionary duty to provide such a settlement of tax liabilities.

(d) While respondent denies the IRS failed to follow its own procedures, the purpose of IRS procedures is to govern the internal affairs of the IRS; the procedures of the IRS do not have the force or effect of law. Vallone v. Comm'r, 88 T.C. 794 (1987). Accordingly, IRM requirements are merely directory and not mandatory, such that noncompliance does not render an action of the IRS invalid. See Marks v. Comm'r, 947 F.2d 983, 986 n.1 (D.C.Cir. 1991) (holding that “[i]t is well settled ... that the provisions of the [Internal Revenue M]annual are discretionary rather than mandatory, are not codified regulations and clearly do not have the force and effect of law); U.S. v. Horne, 714 F.2d 206, 207 (1st Cir. 1983) (stating that the provisions of the IRM are not codified and even if they were, the provisions would not be “mandatory,” and that their purpose is to govern the internal affairs of the IRS). Courts have generally said the IRM is not for

the protection of taxpayers. Vallone v. Comm’r, 88 T.C. 794 (1987). Thus, the IRM does not create any enforceable rights for taxpayers. See Fargo v. Comm’r, 447 F.3d 706, 713 (9th Cir. 2006), affg. T.C. Memo 2004-13 (citing cases from five other circuits in stating that the IRM “does not have the force of law and does not confer rights on taxpayers”); Brombach v. C.I.R., T.C. Memo 2012-265 (holding that the IRM is not a source of rights enforceable by taxpayers”). In the present case, the decision of the IRS to deny petitioner’s application for the VCSP does not violate any statute, regulation, or other law. Consequently, the Court does not have jurisdiction to overturn an IRS interpretation of, or IRS decision made under, IRS procedures such as the IRM.

11. Upon the granting of this motion, no issues remain for trial.
12. Petitioner disagrees with respondent’s position.

WHEREFORE, it is prayed that this motion be granted.

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Date: October 19, 2021

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