



**Received**  
11/05/21 03:41 pm

**Filed**  
11/05/21

Treece Financial Services Group,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed  
Docket No. 20850-19

## Opposition to Motion for Partial Summary Judgment

**SERVED 11/05/21**

**UNITED STATES TAX COURT  
Washington, D.C. 20217**

Treece Financial Services Group	)	
	)	Docket No. 20850-19
Petitioner,	)	
	)	
v.	)	<b><u>OPPOSITION TO RESPONDENT'S</u></b>
	)	<b><u>MOTION FOR SUMMARY JUDGMENT</u></b>
Commissioner of Internal Revenue	)	
	)	
Respondent.	)	<i>Filed Electronically</i>
	)	
	)	
	)	

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Now comes Petitioner, Treece Financial Services Group, who, by and through its undersigned counsel, hereby moves this honorable Court for an Order denying, in its entirety, Respondent's Motion for Partial Summary Judgment ("Motion"), filed on October 19, 2021. A Brief in Support to Petitioner's Opposition is attached hereto and incorporated by reference herein.

Respectfully submitted,

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*Attorneys for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Opposition to Respondent's Motion for Partial Summary Judgment was served upon the following on November 5, 2021, via electronic mail and the Court's electronic filing system:

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## **BRIEF IN SUPPORT**

### **I. STATEMENT OF FACTS**

On October 10, 2019, Respondent issued a Notice of Employment Tax Determination to Petitioner, claiming that Petitioner owed employment taxes for the 2015, 2016 and 2017. (Respondent's Motion, p. 1-2). While Petitioner received Respondent's Notice of Determination, it never received any notice from Respondent that it was under an employment tax or worker classification audit. (Petitioner's Motion, p. 4; Ex. A).

The parties have resolved many of the issues that led to the filing of this Petition; however, the remaining issues before this Court are whether Petitioner is entitled to resolve its employment taxes through Respondent's Voluntary Classification Program ("VCSP"), and whether this Court has the jurisdiction and authority to compel Respondent to allow Petitioner to resolve its employment taxes through the VCSP. (Respondent's Motion, p. 3). Based on the reasons set forth below, Petitioner must be allowed to settle its taxes through the VCSP, and this Court has the ability to determine Petitioner's employment taxes owed based on the Respondent's VCSP.

Accordingly, Petitioner respectfully requests that this Court deny Respondent's Motion in its entirety, and grant Petitioner's Motion for Summary Judgment filed on October 20, 2021.

### **II. ARGUMENT**

#### a. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides the standard for determining motions for summary judgment. When a party moves for summary judgment, "[t]he court shall grant summary judgment if the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*

b. The Anti-Injunction Act does not prevent the U.S. Tax Court from exercising jurisdiction over this matter

The Anti-Injunction Act provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.” 26 U.S.C. § 7421(a). The Declaratory Judgment Act also prohibits most declaratory suits “with respect to Federal taxes.” 28 U.S.C. § 2201(a). Both the Anti-Injunction Act and the Declaratory Judgment Act have been interpreted to be “coterminous.” Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067 (D.C. Cir. 2015), quoting Cohen v. United States, 650 F.3d 717, 730–31 (D.C.Cir.2011) (en banc). The Anti-Injunction Act reads, in relevant part, as follows:

Tax.--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, 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 such tax was assessed. 26 U.S.C. § 7421(a).

While the Anti-Injunction Act generally prohibits suits that would restrain the assessment or collection of taxes, 26 U.S.C. § 7436 creates an explicit exception for

cases involving “Proceedings for determination of employment status”. Specifically, 26 U.S.C. § 7436 states:

(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 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.

There is no argument that this dispute was appropriately filed before the U.S. Tax Court. Petitioner brought this case because of a controversy involving Respondent’s classification of Dock Treece as an employee of Petitioner. The exception created by 26 U.S.C. § 7436 clearly provides this Court with jurisdiction over this dispute. There is no support to Respondent’s position that, simply because the parties have reached an agreement on other issues comprising the overall dispute, this Court does not have the jurisdiction to decide the remaining issues.

In addition, 26 U.S.C. § 7436(a) permits the Tax Court to “determine whether such a determination by the Secretary is correct and the proper amount of employment tax under such determination.” Stipulations aside, there remains a dispute in this matter over the proper amount of employment taxes owed to Respondent. Petitioner is not asking this Court for declaratory judgment; it is asking this Court to determine the employment taxes owed after considering the reduction provided through the Respondent’s VCSP. Through Respondent’s program, Petitioner could settle its employment taxes for payment of 10%

of the tax liability, or in this case \$1,856.17. As such, the Declaratory Judgment Act does not prevent this Court from deciding the remaining issues before it.

Because neither the Anti-Injunction Act nor the Declaratory Judgment Act prevent this Court from exercising jurisdiction over this matter, this Court is well within its authority to determine the employment taxes owed by Petitioner after considering the benefits provided through Respondent's VCSP.

c. The U.S. Tax Court may compel Respondent to follow its own procedures

To be eligible for the VCSP, a taxpayer must: 1) have consistently treated the workers as nonemployees; 2) must have filed all required Forms 1099, consistent with the nonemployee treatment, for the previous three years; and 3) cannot currently be under employment tax audit by the IRS. Internal Revenue Manual 4.23.20 "Voluntary Classification Settlement Program (VCSP) Procedures"; See, also, Internal Revenue Bulletin 2012-51, Announcement 2012-45). Following a taxpayer's application, IRM 4.23.20.12 (06-22-2020) "Conclusion of Review" allows for only three possible VCSP outcomes:

1. Accepted: The applicant meets the basic eligibility requirements. Prepare the VCSP Agreement using the VCSP Closing Agreement template. Follow IRM 4.23.20.13, Accepted Application, to process the agreement.
2. Rejected: The applicant doesn't qualify for the VCSP agreement. Prepare Letter 5225, General Rejection Letter, and give the case file to the manager for review. The manager will sign the letter and return the case to the TE to upload the signed letter to RCCMS and mail the original to the taxpayer. The case will be closed on RCCMS and the paper file forwarded to the manager for a final review and closure;
3. Withdrawn Applications: The applicant withdraws the application. Confirm the withdrawal by preparing Letter 5225 to the taxpayer. Check the "Other" box and enter "This acknowledges receipt of your VCSP application withdrawal." Give the case file to the manager for

review. The manager will sign the letter and return the case to the TE to upload the signed letter to RCCMS and mail the original to the taxpayer. The case will be closed on RCCMS and the paper file forwarded to the manager for a final review and closure.

Petitioner has met all requirements necessary for admission to the VCSP, and The Internal Revenue Manual does not give Respondent the discretion to deny a Taxpayer admission in this situation.

While the Internal Revenue Manual does not have the same force and effect as other codified statutes, Respondent still has a duty to observe the rules, regulations, or procedures which it has established. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). This Court has considered Accardi's application in other cases such as *Grace Found. v. Commissioner*, T.C. Memo. 2014-229, 108 T.C.M. (CCH) 513. While in *Grace Found.*, the Court determined that the requirements of applicable law or administrative procedure had been met, that is not the case here. *Id.* at 6.

Respondent's own policies and procedures list certain requirements that must be met for admission into the VCSP. If a taxpayer meets those requirements, Respondent's own policies and procedures then explicitly state that the application must be accepted. In addition to governing the internal affairs of the IRS, the Internal Revenue Manual is meant to provide information to the taxpayers that the IRS serves, and it should provide those taxpayers with confidence that their tax matters will be handled in a consistent and fair fashion. Respondent has an obligation to follow the policies and procedures that it develops and publishes to the public. The current language of the Internal Revenue Manual is quite clear that Petitioner's VCSP application must be accepted in this situation. Respondent's Manual does not afford its agents the discretion to deny taxpayer

applications that have met VCSP eligibility requirements, and it is obligated to follow the policies that it has established.

### **III. CONCLUSION**

The undisputed facts of this case clearly establish that Petitioner has never been under employment tax audit. Petitioner has satisfied all requirements necessary for admission into Respondent's VCSP, and Respondent does not have the authority to arbitrarily deny entry to the program if the eligibility requirements have been met. Moreover, this Court has jurisdiction over this matter and the authority to determine the correct amount of employment tax Petitioner owes after considering the 90% reduction afforded by Respondent's VCSP.

Accordingly, Petitioner respectfully requests that this Court deny Respondent's Partial Motion for Summary Judgment, and grant Petitioner's Motion for Summary Judgment filed October 20, 2021.

Respectfully submitted,

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