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Treece Financial Services Group,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 20850-19

Response to Motion for Summary Judgment

UNITED STATES TAX COURT

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

RESPONDENT'S RESPONSE TO PETITIONER'S

MOTION FOR SUMMARY JUDGEMENT

In response to Petitioner's Motion for Summary Judgment filed with this Court on October 20, 2021 (hereinafter referred to as "Petitioner's Motion"), Respondent respectfully states as follows:

1. In Petitioner's Motion, Petitioner incorrectly cites the averments in its petition and the arguments and legal conclusions of its authorized representatives as undisputed facts. There has not been a stipulation of facts in this case. Rather, on September 13, 2021, the parties filed a Stipulation of Settled Issues (hereinafter referred to as the "Stipulation") with this 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.

2. The Stipulation further states Respondent agrees to abate all additions to tax under IRC § 6651(a) and penalties under IRC § 6656 asserted in the Notice.

3. Pursuant to paragraph 7 of the Stipulation, the only remaining issue in this case is whether Petitioner is entitled, as a matter of law, to a further settlement under Respondent's Voluntary Classification Settlement Program ("VCSP") of Petitioner's agreed upon tax liability described in paragraph 1(c) above (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).

4. Respondent denies the assertion in Petitioner's Motion that "to date Petitioner has never received notice of any employment or worker classification audit." In particular, Respondent avers the following:

(a) During meetings in May 2018, Respondent's Revenue Agent was able to confirm that Dock D. Treece was an officer of Petitioner and Treece Financial Services Group, and performed substantial services for

both corporations, but was not treated as an employee of either. The Revenue Agent expressed concern to Dock D. Treece and his authorized representatives, Kolena and Lohr, that Dock D. Treece's Form 1040 individual income tax return for the 2015 tax year indicated that no salary was paid by Petitioner or Treece Investment Advisory Corporation to Dock Treece. Based, in part, on these findings, the examination of Dock and Cynthia Treece's 2015 income tax return was expanded to cover the unfiled employment tax returns for both Treece Investment Advisory Corporation and Treece Financial Services Group for 2015, 2016, and 2017, and Dock and Cynthia Treece's 2016 and 2017 income tax returns. See attached Exhibit R-1, Affidavit of Michael E. Novak (hereinafter referred to as "Exhibit R-1"), paragraph 3.

(b) In June 2018, Respondent's Revenue Agent again met with Petitioner's and Treece Investment Advisory Corporation's authorized representatives Kolena and Lohr and discussed, among other things, a settlement under the Classification Settlement Program ("CSP") (see IRM 4.23.6.1 (12-21-2017)) for Petitioner and Treece Investment Advisory Corporation with respect to the Government's proposed reclassification of Dock D. Treece from independent contractor to employee of Petitioner and

Treece Investment Advisory Corporation. The CSP is a program that is specifically available to taxpayers with an open employment tax examination. See IRM 4.23.6.6(1) (12-21-2017). The proposed CSP settlement would have required that Dock D. Treece be reclassified from an independent contractor to an employee of Petitioner and Treece Investment Advisory Corporation for purposes of Dock and Cynthia Treece's Form 1040 returns for the 2015, 2016, and 2017 taxable years. Neither Petitioner nor Treece Investment Advisory Corporation accepted the CSP settlement offer. Exhibit R-1, paragraph 4

(c) In September 2018, the Revenue Agent met with Petitioner's and Treece Investment Advisory Corporation's authorized representatives and discussed several issues, including, among others, whether certain income to Dock D. Treece reported on Forms 1099 issued to him by Petitioner and Treece Investment Advisory Corporation should have been wages reported on Forms W-2. Petitioner's and Treece Investment Advisory Corporation's authorized representatives requested a VCSP settlement with respect to the reclassification of Dock D. Treece from independent contractor of Petitioner and Treece Investment Advisory Corporation to an employee of both corporations. As reflected in Petitioner's Exhibit A-1, the

Revenue Agent provided an explanation, in writing, as to why Petitioner and Treece Investment Advisory Corporation did not meet the eligibility criteria for a VCSP settlement. Specifically, the Revenue Agent said:

> Because the issue was identified in the course of an audit, IRM 4.23.20.7(2) indicates that a taxpayer cannot be under an employment tax audit. While [Treece Financial Services Group] and [Treece Investment Advisory Corporation] may not have formally been under audit, any consideration of reclassifying an independent contractor to an employee is an employment tax audit. Thus, even though all discussions regarding the issue have been connected to the 1040 audit of Mr. Treece's personal return, the issue as to whether he should be reclassified was, in fact, an audit of such corporations' employment tax returns.

Exhibit R-1, paragraph 5.

(d) As reflected in Petitioner's Exhibit A-2, the Revenue Agent contacted Petitioner's authorized representative by facsimile on October 9, 2018 stating, among other things:

> I looked into the VCSP a little more. In addition to my initial reasoning why your client is ineligible for VCSP, the fact that you

haven't filed a Form 8952 as required also makes your client ineligible for VCSP.

Exhibit R-1, paragraph 6.

(e) On October 9, 2018, the Revenue Agent provided Treece Financial Services Group, Treece Investment Advisory Corporation, and their authorized representatives with IRS Publication 1976 (Do You Qualify for Relief Under Section 530?) by U.S. Mail in accordance with IRM 4.23.5.3.1 (11-22-2017). Exhibit R-1, paragraph 7.

(f) Petitioner and Treece Investment Advisory Corporation each submitted a Form 8952 application for VCSP dated October 23, 2018. Exhibit R-1, paragraph 8. The Instructions for Form 8952 (Rev. November 2013) state that to participate in the VCSP taxpayers must meet certain eligibility requirements, including, among others, that the taxpayer "[h]ave no current dispute with the IRS as to whether the workers are nonemployees or employees for federal employment tax purposes." As evidenced by the petition in this case, Petitioner did have a dispute with the IRS as to whether Dock D. Treece was a nonemployee or employee for federal employment tax purposes at the time Petitioner submitted its Form 8952 application for the VCSP.

(g) As reflected in Petitioner's Exhibit A-4, Petitioner's application for the VCSP was denied by letter dated February 28, 2019 because, as stated in the letter, Petitioner was "under an employment tax examination by the IRS."

(h) The Revenue Agent issued a Notice of Employment Tax Determination Under IRC § 7436 ("Notice") with respect to Petitioner on October 10, 2019 for the 2015, 2016 and 2017 tax years. A copy of the Notice is attached to Petitioner's petition in this case.

5. Respondent disagrees with Petitioner's assertion in Petitioner's Motion that "Respondent does not have the discretion to deny Petitioner admission into the VCSP." Announcement 2011-64, 2011-41 I.R.B., which establishes the VCSP, as modified and superseded by Announcement 2012-45, 2012-51, I.R.B. 724, explicitly state in section V thereof (relating to the application process), that the "IRS retains discretion whether to accept a taxpayer's application for the VCSP."

6. In Petitioner's Motion, Petitioner relies on United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) in stating that "it is a long-standing principle that government agencies such as the Internal Revenue Service must

follow its own procedures and regulations." Petitioner's reliance on Accardi is misplaced for many reasons, including:

(a) Accardi is a writ of habeas corpus case in which the petitioner attacked the validity of the denial of his application for suspension of deportation from the United States under provisions of the Immigration Act of 1917, 8 U.S.C. § 155 (1940 ed. Supp.). A writ of habeas corpus is not a cause of action that may be brought in the U.S. Tax Court and the Accardi case otherwise has nothing to do with the Internal Revenue Service, its procedures or regulations, or federal taxes.

(b) The crucial question in the Accardi case was whether certain alleged conduct of the U.S. Attorney General deprived the petitioner in that case of any rights guaranteed him by statute or by regulations. The Accardi Court explicitly stated the case was about whether the Government adhered to regulations with the force and effect of law. In the present case, Petitioner has not alleged the IRS has deprived Petitioner of rights guaranteed Petitioner by statutes or regulations that have the force and effect of law. This is an important distinction, as noted by the court in Avers v. C.I.R., T.C. Memo. 1988-176 (1988). In Avers, a taxpayer relied on the Accardi case in arguing the IRS is bound by the policies it adopts regarding fair and

impartial settlement of cases, and that the Service's failure to follow its own procedures as set out in the IRM is a per se violation of due process. The Avers court held that the procedures of the Service do not have the force and effect of law because their purpose is to govern the internal affairs of the Service. The Avers court said that, as such, the IRM requirements are merely directory rather than mandatory and noncompliance does not render the Service's actions invalid. The Avers court concluded the taxpayer's reliance on the Accardi case was misplaced because it involved a habeas corpus proceeding in which applicable procedural rules did have the force and effect of law. Avers v. C.I.R., T.C. Memo. 1988-176, n. 45 (1988). Like Avers, courts have consistently held that the provisions of the IRM are discretionary rather than mandatory, are not codified regulations and clearly do not have the force and effect of law. See Marks v. Comm'r, 947 F.2d 983, 986 n.1 (D.C.Cir. 1991).

(c) The Court in Accardi specifically stated it was not reviewing the manner in which the Government's discretion was exercised. Rather, the Court in Accardi was objecting to the Board of Immigration Appeals alleged failure to exercise its own discretion contrary to existing valid regulations. The remedy in Accardi, if the petitioner in that case could prove in the lower

courts that the Board failed to exercise its own discretion, would be a new hearing before the Board. The Accardi Court never offered to substitute its discretion for that of the Board. In the present case, the IRS thoughtfully considered Petitioner's application for a VCSP settlement, which is not a right guaranteed by any statute or regulation and exercised its rightful discretion to deny the application. Petitioner in this case is asking this Court to overturn the IRS' discretionary decision to not enter into a VCSP settlement with Petitioner. There is no legal precedent for such an action.

7. In Petitioner's Motion, Petitioner also relies on Damus v. Nielsen, 313 F.Supp.3d 317 (D.D.C. 2018), in arguing "it is incumbent upon agencies to follow their own procedures." In Damus, the court granted a preliminary injunction to a provisional class of plaintiffs who were challenging the practices of five Immigrations and Customs Enforcement ("ICE") field offices. The plaintiffs successfully maintained that ICE was violating a Department of Homeland Security "Parole Directive," a policy memorandum that set forth procedural requirements for determining whether an asylum seeker is eligible for pre-hearing release on parole. The differences between Damus and the present case are striking. In Damus, the plaintiffs met the significant burden of proving they were entitled to a preliminary injunction because ICE failed to meaningfully follow its

Parole Directive. In this case, on the other hand, Respondent followed its internal procedures in determining Petitioner was eligible for a CSP settlement of Petitioner's employment tax liabilities rather than a VCSP settlement. Petitioner simply does not like the conclusions and outcome reached by the IRS as a consequence of the IRS following its own procedures. There is no evidence, in the present case, that the manner in which the Service followed its internal procedures was arbitrary, capricious, discriminatory, or inconsistent. There is no basis or legal authority for a preliminary injunction in the present case against the IRS mandating that the IRS offer Petitioner a VCSP settlement of Petitioner's established employment tax liabilities.

8. Furthermore, as stated in Respondent's Partial Motion To Dismiss, filed with this Court on October 19, 2021, 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 § 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 § 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. § 2201(a), which authorizes federal courts to issue declaratory judgments, except with respect to federal taxes other than actions brought under IRC § 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. § 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]anual 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, this Court does not have jurisdiction to overturn an IRS interpretation of, or IRS decision made under, IRS procedures such as the IRM.

WHEREFORE, it is prayed that Petitioner's Motion for Summary Judgement be denied.

WILLIAM M. PAUL
Acting Chief Counsel
Internal Revenue Service

Date: November 15, 2021

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EXHIBIT R-1

AFFIDAVIT OF REVENUE AGENT MICHAEL E. NOVAK

I, Michael E. Novak ("Affiant"), state that I am the Revenue Agent assigned by the Internal Revenue Service to examine the books and records of Dock D. and Cynthia S. Treece, Treece Financial Services Corporation (also known as Treece Financial Services Group), and Treece Investment Advisory Corporation beginning in 2018 and if called upon to testify under oath in the matter of Treece Financial Services Group v. Commissioner, Docket No. 20850-19, or Treece Investment Advisory Corporation v. Commissioner, Docket No. 21015-19, I would state as follows:

!. I am A Revenue Agent with the Internal Revenue Service with a post of duty at the Ann Arbor Michigan Office of the Internal Revenue Service.

2. I have been an employee of the Internal Revenue Service for 19 years.

3. During meetings in May 2018, I was able to confirm that Dock D. Treece was an officer of Treece Investment Advisory Corporation and Treece Financial Services Group, and performed substantial services for both corporations, but was not treated as an employee of either. I expressed concern to Dock D. Treece and his authorized representatives, Kolena and Lohr, that Dock D. Treece's Form 1040 individual income tax return for the 2015 tax year indicated

that no salary was paid by Treece Investment Advisory Corporation or Treece Financial Services Group to Dock Treece. Based, in part, on these findings, the examination of Dock and Cynthia Treece's 2015 income tax return was expanded to cover the unfiled employment tax returns for both Treece Investment Advisory Corporation and Treece Financial Services Group for 2015, 2016, and 2017, and Dock and Cynthia Treece's 2016 and 2017 income tax returns.

4. In June 2018, I again met with Treece Investment Advisory Corporation's and Treece Financial Services Group's authorized representatives Kolena and Lohr and discussed, among other things, a settlement under the Classification Settlement Program ("CSP") (see IRM 4.23.6.1 (12-21-2017)) for Treece Investment Advisory Corporation and Treece Financial Services Group with respect to the Government's proposed reclassification of Dock D. Treece from independent contractor to employee of the two corporations. The CSP is a program that is specifically available to taxpayers with an open employment tax examination. See IRM 4.23.6.6(1) (12-21-2017). The proposed CSP settlement would have required that Dock D. Treece be reclassified from an independent contractor to an employee of Treece Investment Advisory Corporation and Treece Financial Services Group for purposes of Dock and Cynthia Treece's Form 1040 returns for the 2015, 2016, and 2017 taxable years. Neither Treece Investment

Advisory Corporation nor Treece Financial Services Group accepted the CSP settlement offer.

5. In September 2018, I met with Treece Investment Advisory Corporation's and Treece Financial Services Group's authorized representatives and discussed several issues, including, among others, whether certain income to Dock D. Treece reported on Forms 1099 issued to Dock Treece by Treece Investment Advisory Corporation and Treece Financial Services Group should have been wages reported on Forms W-2. Treece Investment Advisory Corporation's and Treece Financial Services Group's authorized representatives requested a settlement under the IRS Voluntary Classification Settlement Program ("VCSP") with respect to the reclassification of Dock D. Treece from independent contractor of Treece Investment Advisory Corporation and Treece Financial Services Group to an employee of both corporations. I provided an explanation, both orally and in writing, as to why Treece Investment Advisory Corporation and Treece Financial Services Group did not meet the eligibility criteria for a VCSP settlement. Specifically, in writing, I said:

> Because the issue was identified in the course of an audit, IRM 4.23.20.7(2) indicates that a taxpayer cannot be under an employment tax audit. While Treece Financial Services Group and Treece Investment Advisory Corporation may not have formally been under audit, any consideration of

reclassifying an independent contractor to an employee is an employment tax audit. Thus, even though all discussions regarding the issue have been connected to the 1040 audit of Mr. Treece's personal return, the issue as to whether he should be reclassified was, in fact, an audit of such corporations' employment tax returns.

6. Additionally, I contacted Treece Investment Advisory Corporation's and Treece Financial Services Group's authorized representative by facsimile on October 9, 2018 stating, among other things:

> I looked into the VCSP a little more. In addition to my initial reasoning why your client is ineligible for VCSP, the fact that you haven't filed a Form 8952 as required also makes your client ineligible for VCSP.

7. On October 9, 2018, I provided Treece Financial Services Group, Treece Investment Advisory Corp, and their authorized representatives with IRS Publication 1976 (Do You Qualify for Relief Under Section 530?) by U.S. Mail in accordance with IRM 4.23.5.3.1 (11-22-2017).

8. I subsequently became aware that Treece Investment Advisory Corporation and Treece Financial Services Group each submitted a Form 8952 application for VCSP dated October 23, 2018. The Forms 8952 were

submitted as an exhibit attached to correspondence dated October 31, 2018, addressed to me.

FURTHER AFFIANT SAYETH NOT.

Dated: November 12, 2021

Michael E. Novak Digitally signed by Michael E. Novak
Date: 2021.11.12 10:12:18 -05'00'

Michael E. Novak