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Treece Financial Services Group,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

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Docket No. 20850-19
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Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161

UNITED STATES TAX COURT

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

MOTION FOR RECONSIDERATION OF OPINION

RESPONDENT MOVES under Rule 161 of the Tax Court's Rules of Practice and Procedure that the Court reconsider its Opinion filed on April 19, 2022, in this case.

IN SUPPORT THEREOF, respondent respectfully states:

1. In its Opinion filed April 19, 2022, the Court held that it has "jurisdiction to determine whether the liability is correct in proceedings for determination of employment status." The Court reasoned that since it has jurisdiction to determine the correct amount of employment tax in proceedings for determination of employment status under section 7436(a), then it logically follows that the Court has jurisdiction to review a denial of eligibility for the Voluntary Compliance Settlement Program (VCSP), which affects the amount of the employment tax liability. Thus, the court concludes that it has "jurisdiction to determine whether

the VCSP enters into the computation of petitioner's taxes owed." Treece Fin. Svcs Grp. v. Commissioner (Treece), 158 T.C. No. 6, slip op at 5.

2. Tax Court Rule 161 requires that any motion for reconsideration shall be filed within 30 days of service of a written opinion. The Court served its opinion on the parties on April 19, 2022. Thus, respondent's motion is timely.

3. The Court may grant a motion for reconsideration to correct a substantial error of fact or law. Vaughn v. Commissioner, 87 T.C. 164, 166–67 (1986).

4. Respondent respectfully submits that the Court made substantial errors of law in concluding that this Court has jurisdiction to review respondent's denial of petitioner's VCSP application and jurisdiction to determine whether VCSP applies to the computation of petitioner's employment tax liabilities at issue in this proceeding, and that these errors of law are predicated on substantial errors of fact in the Court's understanding of the nature of the program.

5. Specifically, the Court erred in that:

(a) Respondent's denial of petitioner's VCSP application does not constitute a "determination" under section 7436(a)[1] in connection with an "examination";

(b) The VCSP is not a determination of the "correct and the proper amount of employment tax." Treece at 5. Rather, it is a settlement program that allows for taxpayers to voluntarily reclassify their own workers and treat them as employees prospectively in exchange for a settlement payment in an amount that is a significant departure from the employment tax rates imposed by the Code. More specifically, the VCSP results in the parties entering into a closing agreement pursuant to section 7121 that: 1) requires the taxpayer to treat the class(es) of workers as employees beginning on a date chosen by the taxpayer; 2) provides retroactive audit relief for a taxpayer in that the IRS agrees not to disturb the taxpayer's prior classification of the worker(s) as nonemployees for prior tax periods; and 3) the IRS collects a minimal

[1] Unless otherwise provided, all section references are to the Internal Revenue Code of 1986, as amended ("I.R.C." or "Code"), and the applicable Treasury Regulations ("Treas. Reg.") thereunder.

payment amount equal to only 10 percent of the amount of employment taxes that would have been due on compensation paid to the workers being reclassified for just the most recent tax year[2] prior to the filing of the VCSP application, calculated under reduced rates; and

(c) The VCSP does not reflect an administrative "examination" or "determination" of employment tax due pursuant to section 7436(a).

The VCSP in General

6. Internal Revenue Manual (IRM) 4.23.20 (Feb. 9, 2017)[3] describes the program scope and objectives of VCSP as an optional voluntary compliance program that provides an opportunity for taxpayers to reclassify their workers as employees for employment tax purposes for future tax periods. If a taxpayer's VCSP application is accepted, the taxpayer and the IRS will enter into a closing agreement pursuant to section 7121 wherein the applicant agrees to prospectively

[2] The method for determining the amount of the payment that is due upon execution of a closing agreement by the parties is an example of how the program significantly departs from calculating the actual tax due.

[3] The citations to the Internal Revenue Manual are to those that were in effect at the time the audit underlying the present proceeding occurred and may not reflect current language contained in the Internal Revenue Manual.

treat the class or classes of workers as employees for future tax periods and the IRS agrees not to disturb the prior treatment of the worker as a nonemployee in prior tax periods. In exchange, the taxpayer makes a payment of 10 percent of the employment tax liability that would have been due on compensation paid to the workers for the most recent tax year prior to the date of their application, determined under the reduced rates provided in section 3509. The payment is not applied to any of the applicant taxpayer's tax modules. Rather, it is deposited in the General Treasury Fund.

7. Revenue Agents are not authorized to accept, reject, or execute a VCSP closing agreement. Only the Centralized Employment Tax Operations (CETO) Unit can accept or reject a VCSP application and the only person authorized to execute the VCSP Closing Agreement on behalf of the IRS Commissioner is a Centralized Employment Tax Operations (CETO) Group Manager. See IRM 1.2.2.5.39 (November 19, 2015), Delegation Order 4-50 (Rev. 1).

8. The VCSP is not an audit or examination. Rather, the VCSP falls within the category of Service-administered programs for selective issue resolution that are open to the voluntary participation of taxpayers and qualify as contacts by the IRS with taxpayers that are not examinations, inspections, or reopenings for purposes of section 7805(b)(2). Rev. Proc. 2005-32, 2005-1 C.B. 1206.

9. Respondent does not dispute that petitioner mailed an application to participate in the VCSP, but, as noted in the Court's opinion, respondent rejected petitioner's VCSP application. Accordingly, the parties never entered into a closing agreement under the VCSP and the provisions contained in the VCSP do not apply in this proceeding.

Respondent's Rejection of Petitioner's VCSP Application Does Not Constitute a "Determination" Under IRC 7436(a) in Connection with an "Examination".

10. Section 7436(a) confers jurisdiction over employment tax liabilities on the Court and provides:

> 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.

11. In American Airlines, Inc., the Tax Court concluded that the following four requirements must be satisfied for the Court to exercise jurisdiction pursuant to section 7436:

(1) an examination in connection with the audit of any person;

(2) a determination by the Secretary that –

- one or more individuals performing services for such person are employees of such person for purposes of subtitle C, or
- such person is not entitled to the treatment under Section 530(a) with respect to such an individual;

(3) an "actual controversy" involving the determination as part of an examination; and

(4) the filing of an appropriate pleading in the Tax Court.

American Airlines, Inc., 144 T.C. 24, 32 (2015). See also, SECC Corp. v. Commissioner, 142 T.C. 225 (2014).

12. Under the first prong of American Airlines, the Commissioner must have conducted an examination in connection with an audit. American Airlines, Inc, 144 T.C. at 32.

13. Respondent does not dispute that an audit or examination occurred in connection with petitioner's employment tax liabilities for the taxable periods

included in the 2015, 2016 and 2017 tax years, and the calendar years 2015, 2016 and 2017 ("the periods at issue"), for which petitioner properly invoked this Court's jurisdiction.

14. Respondent disputes that the VCSP application denial was part of the examination underlying the present proceeding.

15. Rather, as in the case of all VCSP applications, consideration of petitioner's VCSP application was made separate and distinct as part of a voluntary compliance settlement initiative that is not considered an "audit" or "examination".

16. In B G Painting, Inc. v. Commissioner, T.C. Memo. 2016-62, the Court held that IRS's review of information provided with a Form SS–8 submission is not considered an "audit" or "examination." Likewise, a review of a VCSP application is not part of nor does it constitute an audit or examination. VCSP applications arise when a taxpayer, on its own, voluntarily seeks to treat a worker or class of workers as employees for federal employment tax purposes and to enter into a closing agreement with respondent. " See also Staffmore v. Commissioner, T.C. Memo. 2013-187; See also SECC v. Commissioner, 142 T.C. at 236 n.7.[4]

[4] This Court has also uniformly held that voluntary participation in connection with tax administration by a taxpayer even if the taxpayer produces books and records for review by the IRS, does not constitute an "examination" or an "audit".

17. Nor does the VCSP involve requests for the production of books and records or a determination of a taxpayer's employment tax liabilities. Rather, if an application is accepted, the end result is that the parties enter into a closing agreement that provides certainty, a payment that is not attributed to the particular taxpayer's tax account, and future compliance at established employment tax rates.

18. As such, because the VCSP is an entirely voluntary compliance initiative that does not involve the inspection of books or records, similar to an SS-8 Determination, the acceptance or rejection of a VCSP application does not involve an "examination" in connection with an "audit" relating to any person, as clearly required in the Court's American Airlines Opinion.

19. Nor does the IRS make any "determinations" regarding the proper classification of workers under either section 7436(a)(1) or (a)(2) as part of the VCSP.

20. Rather, it is the applicant who has determined that the worker(s) identified in the VCSP application should be treated as an employee(s) for federal

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See B G Painting, Inc. v. Commissioner, T.C. Memo. 2016-62, citing Ballantine v. Commissioner, 74 T.C. 516, 524 (1980) (where the Commissioner conducts a second inspection of a taxpayer's books and records without first notifying the taxpayer that an additional inspection is necessary, section 7605(b)4 is violated); Seiffert v. Commissioner, T.C. Memo. 2014–4.

employment tax purposes and is requesting the IRS enter into a closing agreement consistent with the applicant's determination.

21. Accordingly, the denial of petitioner's VCSP application is therefore not a determination under section 7436(a)(1) or (2) because it is simply the rejection of a VCSP application wherein a taxpayer has determined that certain of its workers should be treated as employees prospectively.[5]

22. As stated above, respondent does not dispute that the Court has jurisdiction over the determinations made by respondent set forth in the notice underlying the present proceeding. However, respondent made no determination with regard to petitioner's VCSP application as part of such notice, and, as demonstrated above, the rejection of petitioner's VCSP application occurred outside the context of the audit underlying the present proceeding.

23. Respondent recognizes that petitioner first raised the prospect of entering into a VCSP agreement with respondent Revenue Agent Michael Novack

[5] Respondent notes that the calculation of the settlement amount is only one aspect of the VCSP agreement. In addition, the taxpayers are agreeing to treat their workers as employees prospectively. By determining whether the VCSP terms that were never implemented through a voluntary closing agreement could apply to the calculation of the correct amount of tax in this case, the Court would be determining that only a portion of the program applies without taking into account the other aspects of the agreement.

during the audit of petitioner's employment tax liabilities at issue and subsequently provided him with a copy of petitioner's Form 8952.

24. Additionally, respondent does not dispute that Revenue Agent Novack advised petitioner of his belief that petitioner would not be eligible for VCSP on two separate occasions during the audit of petitioner's employment tax liabilities prior to the time petitioner filed its application.

25. However, Revenue Agent Novack's actions in this regard do not constitute determinations under section 7436(a) for which the Court may properly assert jurisdiction.

26. First, although Revenue Agent Novack advised petitioner of his belief as to petitioner's eligibility for VCSP prior to the time petitioner mailed its application to CETO, Revenue Agent Novack neither had the authority to accept or reject petitioner's application for VCSP, as only respondent's CETO unit is delegated with authority to do so. IRM 1.2.2.5.39 (November 19, 2015), Delegation Order 4-50 (Rev. 1).

27. Moreover, Revenue Agent Novack did not have the authority to execute a VCSP agreement on behalf of the Commissioner, as only respondent's CETO unit is delegated with authority to do so. IRM 1.2.2.5.39 (November 19, 2015), Delegation Order 4-50 (Rev. 1). See Johnson v. Commissioner, 136 T.C.

475, 497 (2011) ("The Commissioner is thus not bound by an apparent settlement where an agent is without authority to compromise a taxpayer's tax liability."); Longino v. Commissioner, T.C. Memo. 2018-175, at *8 ("Even if the IRS employee were thought to have made a settlement offer, no settlement of any kind is binding on the IRS unless it is duly authorized and properly memorialized, e.g., in a closing agreement under section 7121."); see also Joyce v. Gentsch, 141 F.2d 891, 895 (6th Cir. 1944) ("Upon the principle of the Botany Mills case, the consent of the Secretary of the Treasury has been considered by circuit courts of appeal as essential to the validity of a stipulation concerning tax liability, where such stipulation is in the nature of a compromise.") (citing Botany Worsted Mills v. U.S., 278 U.S. 282 (1929)).

28. As such, neither Revenue Agent Novack's actions or respondent's rejection of petitioner's VCSP application constitute a "determination" under section 7436(a) in connection with an "examination" for which the Court can properly assert jurisdiction.

The VCSP Does Not Affect a Taxpayer's Employment Tax Liability for Any Tax Period as Calculated under the Internal Revenue Code

29. The Code imposes certain excise taxes on wages paid by employers, as well as requires employers to withhold from an employee's wages and pay over

income taxes and the employee's share of employment taxes to the IRS. See sections 3101, 3111, 3102, 3402, 3403. Collectively, these impositions are referred to as "employment taxes."

30. The Code provides several rates used for purposes of calculating employment tax liabilities. For the tax periods at issue in this case, the ordinary rates for Social Security and Medicare taxes are 12.4% and 2.9% respectively. For the tax periods at issue in this case, the ordinary rate for income tax withholding is 25%.

31. Section 3509 provides reduced rates for an employer's liability for income tax withholding and the employee portion of the FICA taxes where the employer failed to deduct and withhold those taxes because it treated the employee as a non-employee. That liability is reduced to 1.5% of the employee's wages for income tax withholding and 20% of the employees' portion of the FICA tax. I.R.C. § 3509(a). However, if the employer failed, without reasonable cause, to comply with applicable information reporting requirements consistent with the treatment of the employee as a non-employee, those percentages are doubled. I.R.C. § 3509(b). An employer is liable for the full tax where it intentionally disregarded the deduction and withholding requirements. I.R.C. § 3509(c).

32. VCSP does not contain any statutory rates for determining a taxpayer's employment tax liabilities. Rather, a taxpayer whose application is accepted will make a payment equal to 10 percent of the amount of employment tax due for the prior year, as calculated under the reduced rate of section 3509(a), based on the taxpayer's representations and Form(s) 1099 filed for that year upon execution of a closing agreement.[6]

33. In exchange, the IRS agrees not to disturb the taxpayer's prior classification of the worker(s) and will consider any potential Federal employment tax liability for prior periods as fully satisfied."

34. Notably, at no point during the VCSP does the IRS make any representation or determination as to what the taxpayer's liability actually is. More specifically, the IRS does not claim that the taxpayer's payment is the amount of the taxpayer's liability, only that the taxpayer's liability is deemed satisfied under the terms of the closing agreement.

35. A taxpayer's liability exists by operation of statute, distinct from the IRS's discretionary efforts to bring taxpayers into compliance through the VCSP.

[6] VCSP payments received by the IRS are posted to the IRS General Fund; as they are not tax assessments, they are not posted to a specific taxpayer module. See IRM 4.23.20.13.2.1.

36. Consequently, the Court erred in asserting that a taxpayer's eligibility for VCSP "directly affects the amount of tax" and "enters into the computation of petitioner's taxes owed." Rather, VCSP is a voluntary settlement initiative which involves payment of a settlement amount that is not applied to a particular taxable period or tax liability along with a representation to treat workers as employees prospectively, in consideration for the IRS's agreement not to disturb the taxpayer's prior treatment of the worker as a nonemployee.

37. Since VCSP closing agreements are only available through the IRS's discretionary VCSP to bring taxpayers into compliance, this Court does not have jurisdiction to redetermine petitioner's employment tax liabilities based on the amount of the payment petitioner would theoretically have made in lieu of that liability through the VSCP initiative.[7]

38. The court must apply the statute in determining the correct and proper amount of the liability under section 7436(a) in the present proceeding.

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[7] Respondent notes that the facts in this case are distinguishable from the facts in Eaton Corp. v. Comm'r, 140 T.C. 410 (2013). In Eaton, the Court noted that respondent and the petitioner agreed that "by entering into the [advance pricing agreements (APAs)] at issue that the administration and legal effect of the APAs at issue would be governed by the applicable revenue procedures." Id. at 416. In this case, the parties never reached an agreement; both parties in this case are bound by the Internal Revenue laws.

The VCSP Does Not Reflect an Administrative Determination of Employment Tax Due Pursuant to a Specific Statute

39. In its Opinion, the Court analogized to its deficiency jurisdiction, which "includes reviewing administrative determinations that are necessary to determine the merits of deficiency determinations." Treece, slip op. at 4. For this proposition, the Court cited Trimmer v. Commissioner, 148 T.C. 334 (2017), Capitol Fed. Sav. & Loan Ass'n & Sub. v. Commissioner, 96 T.C. 204 (1991), Mailman v. Commissioner, 91 T.C. 1079 (1988), and Estate of Gardner v. Commissioner, 82 T.C. 989 (1984).

40. In each of these cases, however, the administrative determination over which the Court asserted jurisdiction is a specific, substantive determination under an explicit, exclusive grant of discretionary authority by Congress. That is, each determination specifically addresses a particular fact or basis for relief, relates exclusively to a particular tax item, substantively affects a taxpayer's liability under the Code, and is made pursuant to discretion explicit in the statutory language (e.g., "the Secretary may…").

41. In Trimmer, married taxpayers petitioned for redetermination of an income tax deficiency arising primarily from the IRS's denial during the examination of petitioners' individual income tax return of the taxpayer's request

for a hardship waiver from tax pursuant to section 402(c)(3)(b) on the husband's retirement distributions, which the taxpayers failed to roll over into an individual retirement account within 60 days of receipt. Trimmer, 148 T.C. 334. Respondent asserted in Trimmer respondent's exercise of discretion in denying a hardship waiver under section 402(c)(3) is not subject to judicial review. Id. However, this Court held it had jurisdiction to review the denial of petitioners' request for a waiver of the 60-day rollover requirement and further determined that respondent abused its discretion in denying petitioner's request. Id.

42. In Capitol Fed. Sav. & Loan Ass'n & Sub., while under examination, petitioner applied for permission to change a method of accounting and asked for permission to spread the adjustment required under section 481(a) over more than one year. Respondent refused to consider the application during the examination and made the method change and related section 481(a) adjustment in the earliest open year under examination. Capitol Fed. Sav. & Loan Ass'n & Sub., 96 T.C. 204.

43. Unlike, the present proceeding, neither party disputed that the Court had jurisdiction to determine whether to uphold respondent's deficiency determinations resulting from his change of petitioner's method of accounting for interest on mortgage pass-through certificates. Id. Rather, because respondent has

wide discretion to allow a taxpayer to change accounting methods as part of its deficiency determination, this Court held that the Commissioner's refusal to process petitioner's application for an accounting method change under section 446(b) is subject to judicial review in a deficiency proceeding. Id at 214-15.

44. In Mailman, petitioner failed to report embezzled funds used for gambling on his federal income tax returns. Respondent determined income tax deficiencies and additions to tax for negligence. Respondent also determined an addition to tax pursuant to section 6661. Petitioner filed a petition asserting that respondent acted unreasonably in failing to waive the addition to tax pursuant to section 6661. Mailman, 91 T.C. 1079. This Court held that respondent's denial of petitioner's request for waiver of the addition to tax under section 6661 is subject to judicial review in a deficiency proceeding. Id at 1083.

45. Finally, in Estate of Gardner, petitioner failed to file an estate tax return within nine months after the death of the decedent, but it was filed within the 18-day extension of time requested by petitioner for filing of the return under section 6081(a). Estate of Gardner, 82 T.C. 989. Respondent issued a statutory notice to petitioner in which respondent determined that petitioner was not entitled to elect a special valuation rule in determining its tax liability because the election had not been made on a timely filed estate tax return. Id. This Court held that it had

jurisdiction to review respondent's denial of petitioner's request for an extension of time for filing under section 6081(a) because such denial impacted petitioner's tax liability as set forth in the notice underlying the proceeding. Id at 1000.

46. In contrast to each of these cases, in accepting a VCSP application and entering into a closing agreement with a taxpayer, the IRS does not make any determination of a taxpayer's liability under the Internal Revenue Code for any tax year. Rather, the taxpayer pays a settlement amount, agrees to treat workers as employees prospectively in consideration for respondent not disturbing the taxpayer's prior misclassification of the workers thereby resolving prior year liabilities.[8]

47. Furthermore, the VCSP differs from these cases in that the mechanisms of the program are based upon respondent's broad authority to voluntarily settle and resolve cases under sections 7803 and 7121, not as a part of a determination of

[8] The VCSP represents an exercise of the IRS's broad discretion under 7803. See I.R.C. § 7803(a)(2)(A). Further, the VCSP utilizes closing agreements, and section 7121 authorizes and provides the IRS discretion to settle matters "in which there appears to be an advantage in having the case permanently and conclusively closed, or if good and sufficient reasons are shown by the taxpayer for desiring a closing agreement and *it is determined by the Commissioner* that the United States will sustain no disadvantage through consummation of such an agreement." Treas. Reg. 301.7121-1(a)(emphasis added). No such determination was made in any closing agreement in this case.

a taxpayer's employment tax liabilities in connection with an audit or examination using tax rates or procedures under the Internal Revenue Code (e.g., the taxpayers' right to apply for a change in accounting method under section 481).

48. Consequently, the Court erred in analogizing the IRS's consideration of a taxpayer's VCSP eligibility to administrative determinations within the scope of its deficiency jurisdiction, because the VCSP is not specifically provided for in the Internal Revenue Code and is not part of determining an employment tax liability as part of an audit or examination.

Conclusion

49. The Court erred as a matter of law in its Opinion in exercising jurisdiction under section 7436(a) to review the denial of the VCSP because it is neither a determination, examination, or the calculation of the correct and proper statutory employment tax amount.

50. The Court further erred as a matter of law in its Opinion by noting that the VCSP could enter into the calculation of the correct and proper statutory employment tax amount.

51. Therefore, the Court should revise its Opinion to remedy the legal error and conclude that it does not have jurisdiction to review respondent's denial of petitioner's application to the VCSP or to determine whether the relief afforded a

taxpayer who participates in the VCSP is applicable to petitioner's stipulated tax liabilities.

52. Counsel for petitioner objects to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

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Date: 5/19/2022 By: _____

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