

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

MARTIN S. AZARIAN P.A.,	)	
	)	
Petitioner(s),	)	CT
	)	
v.	)	Docket No. 28957-15.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

This matter is before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction (motion to dismiss), filed January 15, 2016, on the grounds that (1) no Notice of Determination of Worker Classification, as authorized by section 7436,<sup>1</sup> was sent to petitioner, and (2) no other determination was made by respondent with respect to petitioner that would confer jurisdiction on this Court pursuant to section 7436. Also on January 15, 2016, in support of his motion to dismiss, respondent filed a Declaration of Julie A. Schwoebel in Support of Motion to Dismiss for Lack of Jurisdiction, and a Declaration of Revenue Agent Andrew F. Harris in Support of Motion to Dismiss for Lack of Jurisdiction.

On February 10, 2016, petitioner filed a Notice of Objection to Motion to Dismiss for Lack of Jurisdiction (notice of objection), which argued that this Court has jurisdiction in this case under section 7436(a)(1) because respondent determined that Martin Azarian (Mr. Azarian) was an employee of petitioner. Also on February 10, 2016, in support of his notice of objection, petitioner filed a Declaration of Eric Johnson in Support of Notice of Objection to Motion to Dismiss for Lack of Jurisdiction.

On September 12, 2016, pursuant to this Court's order on August 4, 2016, respondent voluntarily filed a Statement Under Rule 50(c).

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<sup>1</sup>Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the periods at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

This case was called from the calendar for the Trial Session of the Court at St. Paul, Minnesota, on September 28, 2016, for hearing on respondent's Motion to Dismiss for Lack of Jurisdiction. Both parties appeared and were heard. On October 28, 2016, pursuant to this Court's order on October 12, 2016, both petitioner and respondent each voluntarily filed a supplemental memorandum in support of their respective arguments.

We have reviewed respondent's motion to dismiss and the corresponding documents submitted in support thereof, petitioner's notice of objection and the corresponding documents submitted in support thereof, and considered the oral arguments made by the parties at the September 28, 2016, hearing. We incorporate in this Order by reference thereto the undisputed statements of facts contained in the declarations of Julie A. Schwoebel and Andrew F. Harris. For the reasons summarized below we shall grant respondent's motion to dismiss for lack of jurisdiction.

### Background

The record establishes and/or the parties do not dispute the following. Petitioner is an S corporation and during 2012-14 (taxable periods at issue) operated as a law firm that had as its sole practitioner Mr. Azarian. At all relevant times Mr. Azarian was the sole owner and officer of petitioner.

Petitioner treated Mr. Azarian as an employee during the taxable periods at issue and reported \$37,400, \$32,500, and \$40,000 in wages paid to Mr. Azarian on Forms W-2, Wage and Tax Statement, for 2012-14, respectively.

On August 20, 2015, respondent sent petitioner Forms 4668, Employment Tax Examination Changes Report, which (1) concluded that petitioner failed to report reasonable wage compensation paid to Mr. Azarian for 2012-14, (2) proposed that petitioner should have reported \$125,000 in annual wages to Mr. Azarian for 2012-14, and (3) concluded that petitioner was therefore liable for proposed employment tax increases and additions to tax for 2012-14. Respondent did not issue petitioner a Letter 3523, Notice of Determination of Worker Classification, with respect to the taxable periods at issue.

On November 18, 2015, petitioner filed a petition requesting that this Court overturn the matters proposed by respondent in the Employment Tax Examination Changes Reports.

## Discussion

The Tax Court may exercise jurisdiction only to the extent expressly provided by Congress. See sec. 7442; Breman v. Commissioner, 66 T.C. 61, 66 (1976); see also Rule 13(a). We have the authority to determine whether we have jurisdiction over a particular case. Kluger v. Commissioner, 83 T.C. 309, 314 (1984).

Section 7436 governs proceedings in the Court for determining employment status. Section 7436(a) provides as follows:

SEC. 7436(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.

The parties agree that respondent did not make a determination under section 7436(a)(2) that petitioner was not entitled to relief under section 530 of the Revenue Act of 1978. We agree and conclude that section 7436(a)(2) does not bestow jurisdiction on this Court in this case. At issue is whether there was a determination by the Secretary that Mr. Azarian was an employee of petitioner for purposes of subtitle C.

Petitioner consistently treated Mr. Azarian as an employee for the taxable periods at issue. Therefore respondent did not make a determination that Mr. Azarian was an employee of petitioner, but rather concluded that petitioner failed

to report reasonable wage compensation paid to Mr. Azarian for 2012-14. Section 7436(a)(1) only confers jurisdiction upon this Court to determine the “correct and the proper amount of employment tax” when respondent makes a worker classification determination,<sup>2</sup> not when respondent concludes that petitioner underreported reasonable wage compensation, as is the case here.

Respondent did not make a determination under section 7436(a)(1) or (2), and accordingly we lack jurisdiction in this case.

Accordingly, for the reasons stated, it is hereby

ORDERED that respondent’s Motion to Dismiss for Lack of Jurisdiction, filed January 15, 2016, is granted, and this case is dismissed for lack of jurisdiction.

**(Signed) Joseph W. Nega**  
**Judge**

ENTERED:       **FEB 21 2017**

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<sup>2</sup>We have previously held that our jurisdiction over a determination related to matters specified in sec. 7436(a) can arise where the determination is not made in a formal notice of determination. See SECC Corp. v. Commissioner, 142, T.C. 225, 231 (2014). In this case, however, respondent did not make any determination (in a formal notice or otherwise) related to the matters set forth in sec. 7436(a).