

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

MAS CONSTRUCTION SERVICE LLC,)	
)	
Petitioner,)	
)	
v.)	Docket No. 12528-17S.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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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 September 15, 2017, on the grounds that (1) no notice of determination of worker classification, as authorized by section 7436 to form the basis for a petition to this Court and upon which the Court is conferred with jurisdiction, has been 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 7436.¹ Also on September 15, 2017, and in support of his motion to dismiss, respondent filed the Declaration Of Jason D. Laseter, the Declaration Of Appeals Officer Harold R. Williamson, and the Declaration Of Chenzira Q. Bohannon.² Thereafter, on October 6, 2017, petitioner filed a Notice Of Objection To Motion To Dismiss For Lack Of Jurisdiction (notice of objection). Most recently, by Order of the Chief Judge dated October

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended. All Rule references are to the Tax Court Rules of Practice and Procedure.

² Mr. Laseter is respondent’s counsel in the present case, and Ms. Bohannon is a revenue agent in respondent’s Examination Division.

12, 2017, respondent's motion to dismiss was assigned to the undersigned for disposition.

The Court has reviewed respondent's motion to dismiss and the declarations filed in support thereof, as well as petitioner's notice of objection. The Court incorporates in this Order of Dismissal For Lack Of Jurisdiction the statements of facts contained in the declarations of Jason D. Laseter, Appeals Officer Harold R. Williamson, and Chenzira Q. Bohannon. For the reasons discussed infra, the Court is obliged to grant respondent's motion to dismiss.

Background

The record establishes and/or the parties do not dispute the following:

During 2012 and 2013, the taxable periods at issue, petitioner was an S corporation and was operated as a construction company. At all relevant times Mark A. Sauerhoefer was the sole owner and sole officer of petitioner.

Petitioner treated Mr. Sauerhoefer as an employee during the taxable periods at issue and reported \$4,500 and \$8,550 in wages paid to Mr. Sauerhoefer on Forms W-2, Wage and Tax Statement, for 2012 and 2013, respectively.

On December 22, 2014, respondent sent a letter to petitioner informing it that its 2012 and 2013 Forms 941, Employer's Quarterly Federal Tax Return, and Form 940s, Employer's Annual Federal Unemployment (FUTA) Tax Return, had been selected for examination.

On May 15, 2015, respondent sent to petitioner his initial examination results. As relevant, those results focused on the amount of reasonable wages paid to Mr. Sauerhoefer. In response, petitioner sent a letter disagreeing with respondent's findings, specifically contesting the amount of reasonable wages paid to Mr. Sauerhoefer.

Thereafter, on July 2, 2015, respondent sent a letter to petitioner explaining respondent's finding along with, as relevant, Form 4668, Employment Tax Examination Changes Report. The report (1) concluded that petitioner failed to report reasonable wage compensation paid to Mr. Sauerhoefer for the taxable years in issue, (2) proposed that petitioner should have reported \$40,000 in annual wages to Mr. Sauerhoefer for the taxable periods in issue, and (3) concluded that petitioner was liable for proposed employment tax increases, additions to tax under

section 6651(a)(1) and (2), and penalties under section 6656 for the taxable periods in issue.

In response, petitioner sent several e-mails and a letter to respondent in which it continued to contest the amount of reasonable compensation.

On May 11, 2016, petitioner had an informal Appeals Office hearing. Petitioner continued to raise only matters regarding the issue whether petitioner paid Mr. Sauerhoefer reasonable wages during the periods in issue.

On February 8, 2017, respondent's Appeals Office sent a letter to petitioner containing a settlement offer. Petitioner did not accept the settlement offer.

At no point did respondent ever issue to petitioner a notice of determination of worker classification with respect to the taxable periods at issue.

On June 5, 2017, petitioner filed a petition with the Court, stating, as relevant, that the "taxpayer disagrees with wages determined for 2012-2013 by the IRS and employment taxes assessed".

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). The Court has the authority to determine whether it has 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.

Petitioner consistently treated Mr. Sauerhoefer as an employee for the taxable periods at issue. Therefore, respondent did not make a determination that Mr. Sauerhoefer was an employee of petitioner; rather respondent concluded that petitioner failed to report reasonable wage compensation paid to Mr. Sauerhoefer for the taxable periods at issue. Section 7436(a)(1) confers jurisdiction on this Court only to determine the “correct and proper amount of employment tax” when respondent makes a worker classification determination,³ not when respondent concludes that petitioner underreported reasonable wage compensation, as is the case here.

Furthermore, based on the record before us, petitioner never raised the issue of whether it was entitled to section 7436(a)(2) relief under section 530 of the Revenue Act of 1978. See sec. 7436(a)(2). But more to the point, respondent never made any determination regarding petitioner’s entitlement to such relief.⁴

³ The Court has previously held that its jurisdiction over a determination related to matters specified in section 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 section 7436(a).

⁴ In American Airlines, Inc. v. Commissioner, 144 T.C. 24 (2015), respondent did not make a determination regarding worker classification. However, the Court held that it still had jurisdiction over the case because there was a dispute over whether the taxpayer was entitled to relief under 530 of the Revenue Act of 1978, and respondent made an informal determination regarding such relief. In the present case, and as stated supra, petitioner neither raised such issue nor did respondent make a determination, informal or otherwise, regarding such issue.

In sum, respondent did not make any determination under section 7436(a)(1) or (2). Accordingly the Court lacks jurisdiction in this case and is therefore obliged to grant respondent's motion and dismiss this case for lack of jurisdiction.⁵

Accordingly, for the reasons stated, it is hereby

ORDERED that respondent's Motion To Dismiss For Lack Of Jurisdiction, filed September 15, 2017, is granted, and this case is dismissed for lack of jurisdiction on the ground that respondent neither made any determination of worker classification nor any determination regarding relief under section 530 of the Revenue Act of 1978.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **OCT 31 2017**

⁵ Mr. Sauerhoefer's individual case, docket No. 12527-17S, is calendared for trial at the Court's Atlanta, Georgia trial session beginning on February 26, 2018. According to the notice of deficiency attached to the petition in that case, respondent "determined that your compensation from Mas Construction is \$40,000 per year rather than the \$4,500 and \$8,500 as reported on your returns for the taxable years ending December 31, 2012 and December 31, 2013, respectively". Therefore, Mr. Sauerhoefer may present his arguments to the Court regarding the issue of reasonable compensation when his individual case at docket No. 12527-17S is tried to the Court in February 2018.