Must Taxpayers File "Timely" Forms 1099 to Obtain Code Sec. 530 Relief? Unexpected Answers from a Recent Worker-Classification Case

By Hale E. Sheppard

Hale E. Sheppard analyzes the taxpayer-favorable authorities regarding Code Sec. 530 relief and the Form 1099 filing requirement.

Introduction

When battling the IRS, knowledge is power. Nowhere is this more true than in worker-classification cases, where the IRS often seems hell-bent on treating all workers as employees, regardless of the facts. One bright spot for taxpayers under IRS scrutiny is an obscure provision, commonly known as Code Sec. 530, that grants taxpayers a brand of "civil immunity" if they meet three criteria. One requirement is that taxpayers file Forms 1099 (Miscellaneous Income) for all workers considered to be independent contractors.

For over three decades, the IRS has taken the position that Code Sec. 530 relief is not available unless taxpayers file their Forms 1099 in a "timely" manner. One problem with the IRS's stance is that it has been questioned and contradicted by at least two courts, including the Fifth Circuit Court of Appeals in a recent case called *Bruecher Foundation Services, Inc.*[1] The bigger problem is that too many taxpayers, unaware of the relevant rules and caselaw, allow themselves to lose worker-classification cases, unnecessarily prolong audits, and/or miss opportunities to seek fee reimbursement from the IRS. This article aims to alleviate these problems by highlighting and analyzing the taxpayer-favorable authorities regarding Code Sec. 530 relief and the Form 1099 filing requirement.

Code Sec. 530 Relief in Worker-Classification Cases

Background on Code Sec. 530

Congress introduced Code Sec. 530 over 30 years ago, as part of the Revenue Act of 1978, in an effort to counter aggressive worker-classification audits by the IRS on small businesses.[2] According to the legislative history, the congressional relief provided to companies by Code Sec. 530 was appropriate because (1) the IRS had dramatically increased enforcement of employment tax laws, (2) many of the positions that the IRS began taking were contrary to those followed in earlier years, and (3) obligatory worker reclassification often resulted in double payment of taxes because companies were required to pay federal income taxes and FICA taxes (which the company did not withhold and remit to the IRS originally) for workers, even though such workers may have already paid their own income taxes and self-employment taxes.[3]

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Code Sec. 530 is the Holy Grail of worker-classification cases; the company that satisfies all the criteria to warrant so-called "Code Sec. 530 relief" obtains two major benefits. First, the IRS may not assess any back employment taxes, penalties or interest charges against the company. Second, and perhaps more importantly, the IRS cannot obligate the company to reclassify the relevant workers as employees going forward, regardless of the fact that applicable law supports reclassification. The company gets a free pass, if you will, for past and future behavior.

Given its importance in the employment tax arena, one could write entire books on the history, impact and nuances of Code Sec. 530. This is well beyond the scope of this article, which focuses on two critical, yet obscure, issues concerning Code Sec. 530. The issues are addressed in a recent case from the Fifth Circuit Court of Appeals, *Bruecher Foundation Services*. To appreciate the importance of this case, one must first have a deeper understanding of two duties, one on the taxpayer and one on the IRS.

Taxpayer's Duty–Filing "Timely" Forms 1099

Code Sec. 530 generally provides that if a company has treated a worker as an independent contractor for certain tax periods, then the worker shall be considered an independent contractor for employment tax purposes for such periods, as long as the company meets three additional criteria:

- The company filed information returns in a manner consistent with the worker's status as an independent contractor; that is, the company filed annual Forms 1099 with the IRS reporting all "non-employee compensation" paid to the worker ("Reporting Consistency").
- The company treated all other workers holding substantially similar positions as independent contractors ("Substantive Consistency").
- The company had a "reasonable basis" for treating the worker as an independent contractor ("Reasonable Basis").[4]

With respect to the first criterion, Reporting Consistency, neither the relevant statute nor the legislative history addresses when, exactly, the company must file the Forms 1099 with the IRS in order for a taxpayer to take advantage of Code Sec. 530. For its part, the law states the following:

> If, for purposes of employment taxes, the [company] did not treat an individual as an employee for any period, and ... all Federal tax returns (including information returns) required to be filed by the [company] with respect to such individual for such period are filed on a basis consistent with the [company's] treatment of such individual as not being an employee, then, for purposes of applying such taxes for such period with respect to the [company], the individual shall be deemed not to be an employee unless the [company] has no reasonable basis for not treating such individual as an employee.[5]

The legislative history provides additional detail about the Form 1099 filing requirement, though it does not go so far as to specifically require timeliness.

> Individuals (or classes of individuals) who may not be reclassified [as employees] are those whom the taxpayer consistently has treated in good faith as independent contractors for employment tax purposes. *The taxpayer shall be deemed to have acted in good faith only if all federal tax returns (including information returns) required to be filed by the taxpayer were filed on a basis consistent with the taxpayer's treatment of such individuals as independent contractors* and the taxpayer treated such individuals as independent contractors in reasonable reliance under one or more of four tests.[6]

> To be entitled to relief under Section 530, the taxpayer must not have treated the worker as an employee for any period, and, for periods since 1978, *all Federal tax returns, including information returns, must have been filed on a basis consistent with treating such worker as an independent contractor*. For example, withholding income and employment taxes from a worker's remuneration would not be consistent with treatment as an independent contractor, *and the taxpayer must file a Form 1099 (if required) with respect to the worker as opposed to a Form W-2. If a taxpayer does not file the required information return for a period, it will not be entitled to Section 530 relief for such period.*[7]

As demonstrated above, Congress left ambiguity regarding the timeliness issue, but the IRS has not. Indeed, the IRS has issued several pronouncements over the years stating, in no uncertain terms, that taxpayers must file timely Forms 1099 in order to

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be eligible for the benefits of Code Sec. 530. The first such pronouncement was Rev. Rul. 81-224, which involved a situation where a Revenue Agent conducting an employment tax audit raised the question of whether certain workers should have been treated as employees, and the taxpayer reacted by filing Forms 1099 for the workers. The IRS began its analysis in Rev. Rul. 81-224 by reviewing Code Sec. 6041 and the underlying regulations, which require the filing of Forms 1096 (*Annual Summary and Transmittal of U.S. Information Returns*) and Forms 1099-MISC (*Miscellaneous Income*) by February 28 each year.[8] The IRS ultimately concluded as follows in Rev. Rul. 81-224:

> Under the circumstances described above, the taxpayer is not entitled to the relief provided by section 530 of the Revenue Act of 1978 ... Whether the individuals are employees for those periods for which no Forms 1099 were *timely* filed will be determined under the rules applicable in determining the employer-employee relationship.

A few years later, the IRS issued Rev. Proc. 85-18, one in a series of pronouncements amplifying guidance concerning Code Sec. 530. It clarified the IRS's position that "the relief under Code Sec. 530(a)(1) will not apply, even if the taxpayer has met the 'safe haven' rules ... if the appropriate Form 1099 has not been *timely* filed with respect to the workers involved."[9] Around the same time, the IRS issued at least a half-dozen Technical Advice Memoranda echoing the timeliness requirement.[10] Lest any doubt remain regarding the IRS's sentiment about the limited applicability of Code Sec. 530, the INTERNAL REVENUE MANUAL explains that "[t]axpayers that do not file *timely* Forms 1099-MISC consistent with their treatment of the worker as an independent contractor may not obtain relief under the provisions for section 530 for that worker in that year."[11]

IRS's Duty—Notifying Taxpayers About Code Sec. 530

Code Sec. 530 has remained in effect for over 30 years. The law has been amended three times during this period, and each time the rights of those companies invoking Code Sec. 530 relief were strengthened.[12] For instance, both the law and IRS policies have evolved to ensure that the IRS, not the company under attack, has the duty of broaching the issue of potential relief. Code Sec. 530(e)(1), enacted in 1996, states that IRS personnel conducting a worker-classification audit "shall" provide the company with written notice of the existence and terms of Code Sec. 530 "before or at the commencement of" the audit.[13] This statutory mandate is also found in a variety of other sources. Legislative history, for example, contains the following guidance on the IRS's obligation to notify taxpayers of their rights, particularly as they relate Code Sec. 530 relief:

> [T]he Senate amendment provides that an officer or employee of the IRS must, at (or before) the commencement of an audit involving worker classification issues, provide the taxpayer with written notice of the provisions of Section 530.[14]
>
> The conferees wish to clarify the notice that the IRS must provide to taxpayers at (or before) the commencement of an audit inquiry involving worker classification issues. The conferees recognize that, in many cases, the portion of any audit involving worker classification issues will not arise until after the examination of the taxpayer begins. In that case, the notice need only be given at the time the worker classification issue is first raised with the taxpayer.[15]

Like the legislative history, the IRS's own INTERNAL REVENUE MANUAL features multiple entries mandating that the Code Sec. 530 analysis take place at the beginning of the audit process. Relevant entries include the following:

> Code Sec. 530 is a relief provision that *must* be considered as the *first step* in any case involving worker classification. Relief is available to taxpayers or employers that are under examination or involved in administrative (including Appeals) or judicial proceedings with respect to assessments based on employment status reclassification ... It is not necessary for the taxpayer to claim section 530 relief for it to be applicable. In order to correctly determine tax liability, the examiner must first explore the applicability of section 530 even if the taxpayer does not raise the issue.[16]

The IRS's worker-classification training materials also indicate that "Section 530 is a relief provision that should be considered as the first step in any case involving worker classification."[17] Finally, the

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IRS issued a news release way back in 1996 publicly committing itself to informing taxpayers of their rights and protections at the commencement of a worker-classification audit.[18] Revenue Agents were to implement this notification by supplying taxpayers under audit with IRS Publication 176, which is now called *Do You Qualify for Relief Under Code Sec. 530?* The new release was absolutely clear about the appropriate time for enlightening taxpayers, explaining that Revenue Agents "will provide the new explanation of Section 530 relief requirements at the beginning of any inquiry into worker classification and will answer any questions about eligibility for this relief."[19]

Analysis of the Case–Audit, Trial, Appeal

Administrative Audit

The following facts are derived from multiple court documents.[20] Bruecher Foundation Services, Inc. ("Company") operated a foundation-repair business in Austin, Texas. The president and sole owner was William H. Bruecher. He and Margaret Kilpatrick, who worked in the office, were treated as employees. However, all other workers were treated as independent contractors. During the years at issue, the Company deducted significant amounts on its corporate income tax returns for payments for "contract labor."

The IRS initiated an audit and, in July 2003, it issued an Examination Report proposing to reclassify the independent contractors as employees in 1999 and 2000. Predictably, the Company disputed the Examination Report and sought review by the Appeals Office. In a letter to the Appeals Office in November 2004, the Company's attorney admitted that the Company did not meet the requirement of Reporting Consistency: "I have reviewed the files regarding this audit. The only documents that would appear to me to have any impact on your ability to reverse the findings of [the Revenue Agent] would be Forms 1099 for 1999 and 2000. Unfortunately, it does not appear that such Forms 1099 were prepared and filed by [the Company] for 1999 and 2000." With this concession in hand, the Appeals Office issued its Notice of Determination of Worker Classification, upholding the Revenue Agent's initial conclusion that that workers should have been classified and taxed as employees, not independent contractors.

Battle in U.S. District Court

The Company had the right to further challenge this worker-classification issue on a pre-assessment basis in the Tax Court, but it decided to pursue a different route. In particular, the Company paid the requisite amount of taxes, filed claims for refund with the IRS, and when the IRS disallowed such claims, it filed a Complaint in U.S. District Court. Notably, just two days before submitting the Complaint, in May 2006, the Company filed Forms 1099 for the workers with the IRS. To be considered timely, the Forms 1099 for 1999 should have been filed by February 28, 2000, and the Forms 1099 for 2000 by February 28, 2001. The Forms 1099 for 1999 and 2000 were approximately six and five years late, respectively.

The Complaint alleged that the Company was entitled to relief from worker reclassification under Code Sec. 530 because it met all three requirements, *i.e.*, Reporting Consistency, Substantive Consistency and Reasonable Basis. Regarding Reporting Consistency, the Company acknowledged that it did not file the Forms 1099 until many years after the deadline, but suggested that this is irrelevant because neither the statute nor the legislative history expressly demands that Forms 1099 be filed on a timely basis. In addition, the Company argued in the Complaint that the Revenue Agent failed to explain to the Company about the existence and benefits of Code Sec. 530 at the beginning of the audit, as required by Code Sec. 530(e)(1). The IRS did not refute this claim. According to the Complaint filed by the Company, the proper remedy for this violation by the Revenue Agent is either immediate victory for the Company or the shifting of the burden of proof and persuasion to the IRS.

Later, the Company filed a Motion for Partial Summary Judgment, asking the District Court to determine that the Company met all three elements of Code Sec. 530. The government filed its response with the District Court, raising the following counterpoints. First, with respect to Code Sec. 530, the government argued that the Company was ineligible for relief because it lacked Reporting Consistency, as this concept is defined by the IRS in Rev. Rul. 81-224 and Rev. Proc. 85-18. The government's view was that the requisite Forms 1099 were not filed by February 28, 2000, and February 28, 2001, so they were not "timely." Second, regarding the Revenue Agent's failure to give the Company details about Code Sec. 530 at the commencement of the audit, the government maintained that (1) the remedy proposed

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by the Company had no legal basis, (2) the Revenue Agent (and by extension the U.S. government) did not violate the due process clause because the Company received notice of Code Sec. 530 in the Examination Report and the Company had an opportunity to present objections with the District Court, and (3) even if the government had violated the due process clause, the Company must suffer actual prejudice or harm, which is not feasible since the Company was not eligible for Code Sec. 530 relief because it did not meet the Reporting Consistency requirement.

The District Court issued a Memorandum Opinion and Order denying the Company's Motion for Partial Summary Judgment. The District Court rejected the Company's position about Reporting Consistency on the following grounds:

- The District Court generally grants significant weight to revenue rulings, such as Rev. Rul. 81-224 containing the rules about "timely" filing of Forms 1099.
- The IRS has followed its position in Rev. Rul. 81-224 for more than 25 years, which means that the District Court should give it considerable deference under the standards established by the Supreme Court.
- The legislative history to Code Sec. 530 indicates that Reporting Consistency was introduced to account for the taxpayer's "good faith" in classifying its workers as independent contractors, and the fact that the Company only filed its Forms 1099 years after the fact, only after an IRS audit, fails to demonstrate the "good faith" that Congress envisioned. On this final point, the District Court stated that "[i]nterpreting a late filing such as [the Company's] as satisfying the filing requirement would thus defeat the purpose of such requirement."

The District Court rapidly dispensed with the Company's other argument, too. The District Court acknowledged that the statute and the legislative history both clearly mandate that the IRS notify taxpayers about Code Sec. 530 at the outset of an audit, but recognized that no statutory or regulatory remedy exists to sanction violations by the IRS. The District Court also underscored that the Company's suggested remedy of shifting the burden of proof to the government had "no legal support."

Given this inability to resolve the matter *via* the Partial Motion for Summary Judgment, the case proceeded to trial. The District Court ultimately held that, based on the common-law test, the Company's workers should have been classified as employees.

Appellate Review

The Company, dissatisfied by the rejection from the District Court, filed an appeal with the Fifth Circuit Court of Appeals raising the same three issues.

First Issue—What Constitutes Reporting Consistency?

The Company first argued that it had Reporting Consistency and was thus entitled to special relief under Code Sec. 530, notwithstanding the fact that it filed the Forms 1099 for 1999 and 2000 many years after the deadline. The Fifth Circuit summarized the positions of the parties in the following manner:

> At the outer boundaries of its argument, the [government] would have us hold that a taxpayer's untimely filing of relevant informational returns always deprives that taxpayer of section 530 relief, no matter how minimal the lateness of the filing. By contrast, [the Company] argues that these administrative precedents are not entitled to deference and points us to other aspects of the legislative history and what it terms the plain language of the statute. [The Company] would have us hold that a taxpayer's untimely filing of the required returns never deprives the taxpayer of section 530 relief, so long as the returns are, at some point, filed. Both parties thus ultimately ask us to address the fundamental question of whether or not the Code Sec. 530 safe harbor implicitly requires that Form 1099s be timely filed.

After framing the positions so succinctly, the Fifth Circuit outright refused to rule on the "fundamental question" that it posed. Instead, the Fifth Circuit focused on a much narrower issue, concluding that the Company "cannot successfully raise the Section 530 safe harbor in this action because [the Company] filed its Form 1099s *after the IRS assessed the taxes in dispute here* against [the Company] at the conclusion of the administrative process." Ensuring that the scope of its ruling would not be misinterpreted, the Fifth Circuit later presented its decision in the following terms:

> [W]hile we decline to address the [fundamental] question of whether Code Sec. 530 requires the timely filing of the relevant Form 1099s to obtain the benefit of the safe harbor, we hold that the practical effect of waiting until after the conclusion of the IRS's administrative process

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> and the concomitant assessment of the tax is to preclude [the Company] from successfully raising Code Sec. 530 as a defense in this subsequent judicial proceeding.

The ruling by the Fifth Circuit, applied more broadly, appears to indicate that a taxpayer will have Reporting Consistency as long as it files its Forms 1099 before the IRS "assesses" the employments taxes.

Second Issue—What Remedies Exist for IRS Omissions?

The Company, as it did before the District Court, aired its grievance that the Revenue Agent failed to notify the Company of the existence, requirements and potential benefits of Code Sec. 530 at the beginning of the audit. The parties did not dispute that this notification duty derives from Code Sec. 530(e)(1) and the corresponding legislative history. Moreover, the parties agreed that the Revenue Agent neglected to provide the notice mandated by Congress. Nevertheless, the Fifth Circuit, like the District Court, declined to grant the Company any remedy because (1) the tax code does not authorize a remedy, and (2) the Company failed to prove that its due process rights had been violated.

In support of this ruling, the Fifth Circuit cited *Nu-Look Design, Inc.,* which rejected a due process claim by a taxpayer on grounds that constitutionally-sufficient notice was eventually given to the taxpayer by the IRS in the Notice of Determination of Worker Classification after the conference with the Appeals Office.[21] The Fifth Circuit pointed out that the Company obtained notice about Code Sec. 530 at the end of the audit, thus allowing it sufficient time to exercise its procedural rights to fight the matter before the Appeals Office and/or the proper court.

Third Issue—Were the Workers Common-Law Employees?

The Company argued that, even if it were not eligible for relief under Code Sec. 530 because of the lack of Reporting Consistency, it still owed the IRS nothing because the workers were properly classified as independent contractors under the 20-factor common-law test. The Fifth Circuit upheld the District Court on this issue, too, ruling that the workers should have been treated and taxed as employees in 1999 and 2000.

The Covert Importance of the Case

The importance of *Bruecher Foundation Services*, like many cases, does not immediately jump out at you, as they say. Rather, it requires researching other precedent, understanding the intricacies of worker-classification dispute procedure, and applying unconventional thinking. Set forth below are some little-known, significant aspects of the case.

No Discussion of Tax Court Case Squarely on Point

What is omitted from a case is often much more interesting than what is included. This is true with *Bruecher Foundation Services*, where a Tax Court case directly on point, *Medical Emergency Care Associates, S.C.,* is seemingly absent from the briefing by the parties and thus plays essentially no role in the rulings by the District Court and the Fifth Circuit Court of Appeals.[22]

The taxpayer in *Medical Emergency Care Associates* was a medical services company that maintained contracts with hospitals to provide doctors to staff emergency rooms. The taxpayer, relying on long-standing industry practice, classified the doctors as independent contractors for 1996. The deadline for filing the Form 1096 (*Annual Summary and Transmittal of U.S. Information Return*), together with the Forms 1099, was February 28, 1997. The case presented some uncertainty as to whether the taxpayer filed such information returns in May 1997 or December 1998, but they were late either way. The IRS subsequently began an audit in 1998 and determined that the doctors should have been classified as employees. The IRS issued its Notice of Determination of Worker Classification, which the taxpayer disputed by filing a Petition with the Tax Court.

The parties agreed that the taxpayer met two of the three requirements for Code Sec. 530 relief: The taxpayer had Substantive Consistency (*i.e.*, it treated all the emergency room doctors as independent contractors) and that the taxpayer had a Reasonable Basis for its actions (*i.e.*, it was relying on longstanding industry practice). The only issue, therefore, was whether the taxpayer had Reporting Consistency, which would dictate whether the taxpayer was eligible for the benefits of Code Sec. 530.[23]

The taxpayer first argued that the relevant statute, Code Sec. 530(a)(1), and the corresponding legislative history are silent on the issue of whether Forms

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1099 must be filed in a timely manner, so timeliness must not be required.[24] Next, the taxpayer pointed to the congressional mandate that Code Sec. 530 relief must be "construed liberally in favor of taxpayers," suggesting that such liberality meant that taxpayers do not necessarily need to file their Forms 1099 by the deadline.[25]

The IRS launched various arguments in response. For example, citing to the Blue Book prepared by the U.S. Joint Committee on Taxation, the IRS contended that while Congress may have intended Code Sec. 530 relief to be interpreted liberally, this did not pertain to the filing requirement. The IRS then argued that Code Sec. 530 "implicitly requires" that Forms 1099 be timely filed, as this is mandated for all tax and information returns throughout the Internal Revenue Code. Fortifying its position, the IRS emphasized its own earlier pronouncement, Rev. Proc. 85-18, which unequivocally states the IRS's view that timely filing of Forms 1099 is a prerequisite to Code Sec. 530 relief. Lastly, the IRS explained that if Congress disapproved of how the IRS was interpreting Code Sec. 530 in Rev. Rul. 81-224, Rev. Proc. 85-18, and other IRS pronouncements, it could have modified the language of Code Sec. 530 when it changed the law in 1996, as it did in several other instances.[26]

The Tax Court rebuffed all the arguments, stating that both the taxpayer and the IRS were "off the mark."[27] The Tax Court found unconvincing the contention by the taxpayer that the liberality in interpreting Code Sec. 530 should trump the "pervasiveness of a timely filing requirement" throughout the Internal Revenue Code.[28] Regarding the IRS's positions, the Tax Court stated that the denial of Code Sec. 530 relief is a "totally disproportionate" penalty for the delinquent filing of Forms 1099, particularly since the Code already contains specific provisions outlining the consequences of late-filing information returns.[29] The Tax Court, applying time-honored principles of statutory construction, then issued its initial ruling:

> We agree with [the taxpayer] that its late filing of the information returns does not prevent it from satisfying the filing requirement of section 530(a)(1)(B). The plain language of section 530(a)(1)(B) denies relief only if the required filing was not made or if the required filing was made on a basis not consistent with treatment of the individual as not being an employee. As [the IRS] acknowledges, [the taxpayer] filed all required returns for 1996 on a basis consistent with the treatment of the reclassified physicians as not being employees. But there is nothing in the language of section 530(a)(1)(B) that requires timeliness along with consistent filing.[30]

The Tax Court went on to acknowledge that the IRS was correct in that timely filing of returns is required throughout the Internal Revenue Code. However, noted the Tax Court, the sanctions for late-filing are already contained in Code Secs. 6721 through 6724, which address "Failures to Comply with Certain Information Reporting Requirements." In the case of delinquent Forms 1096 and Forms 1099, the IRS is empowered to assert a penalty of $50 per return, with a maximum penalty of $250,000 per calendar year.[31] The Tax Court then made the following ruling about the interrelationship between Code Sec. 530 and the normal delinquent-return penalties:

> Nothing in the language or legislative history of section 530 leads us to the conclusion that denial of section 530 relief was meant to be an additional penalty for the failure to timely file information returns, particularly under the circumstances in this case ... The [IRS] is entitled to require timely filing and to impose a penalty [under Code Sec.s 6721 through 6724], when appropriate, for failure to timely file, but not the penalty [the IRS] seeks to impose here [*i.e.*, deprivation of Code Sec. 530 relief to the taxpayer].[32]

Finally, the Tax Court addressed the IRS's contention that the Tax Court must defer to the IRS's interpretation of Code Sec. 530, as found in Rev. Rul. 81-224 and Rev. Proc. 85-18. The Tax Court acknowledged the Supreme Court precedent establishing that courts must give an administrative agency's interpretation of a statute a certain level of deference, but noted that the amount of deference required depends on the thoroughness evident in the agency's consideration of the issues, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.[33] The Tax Court then pointed out that the pronouncements cited by the IRS, Rev. Rul. 81-224 and Rev. Proc. 85-15, provide absolutely no reasoning as to why timely filing of Forms 1099 and Forms 1096 is required to warrant Code Sec. 530 relief. Accordingly, the Tax Court was unable to ascertain the thoroughness or validity of the IRS's analysis, and it refused to defer to the IRS pronouncements.[34]

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Given that *Medical Emergency Care Associates* is directly on point and extremely helpful to the Company's case in *Bruecher Foundation Services,* the Company's failure to raise it is surprising. This is particularly true in view of the type of Tax Court decision involved. The Tax Court issues three main types of opinions: summary, memorandum, and reported. The first type, summary opinions, are limited to cases where the amount of tax at issue is $50,000 or less and the taxpayer elects to have the dispute treated as a "small tax case" and placed on the Tax Court's "S" calendar.[35] Decisions by the Tax Court in "S" cases cannot be appealed to another court and they cannot be cited as legal precedent in future cases.[36] The second type, memorandum opinions, are issued by the Tax Court in fact-intensive situations, cases involving well-established legal concepts, or where the dispute is not sufficiently developed at trial to merit precedential treatment. Lest any doubt remain about the relevance of these decisions, the court has held that "[i]t is well established that the Tax Court does not consider its Memorandum Opinions to be binding precedent"[37] and further that "we consider neither revenue rulings nor Memorandum Opinions of this Court to be controlling precedent."[38] The third type, reported decisions, possess increased relevance. The Tax Court normally issues reported decisions (which may be a "division" opinion by one judge or a "reviewed" opinion by all the judges) in cases where the litigants have raised issues of first impression or presented such a well-developed case that it should serve as guidance for future cases.

The ruling in *Medical Emergency Care Associates* was a reported decision by the Tax Court; therefore, although it may not have been binding on the District Court and/or Fifth Circuit Court of Appeals in *Bruecher Foundation Services,* one would think that the Company would have heavily relied upon it as persuasive legal authority. It is not farfetched to believe that an extensive discussion of the earlier Tax Court precedent may have led to a more favorable outcome for the Company in *Bruecher Foundation Services.*

Importance of Identifying the Time of Assessment as the Deadline

As mentioned above, the Tax Court generally held in *Medical Emergency Care Associates* that the late filing of Forms 1099 does not necessarily render a taxpayer ineligible for Code Sec. 530 relief. A more literal interpretation of the case would be that a taxpayer who files Forms 1099 *after* the statutory deadline but *before* the IRS commences a worker-classification audit still has Reporting Consistency.

The Fifth Circuit in *Bruecher Foundation Services* was more specific, ruling that a taxpayer cannot satisfy the Reporting Consistency requirement of Code Sec. 530 if it files after the IRS has "assessed" the employment taxes. Without highlighting it, few people are likely to appreciate the importance of the holding in *Bruecher Foundation Services*, aside from a few tax procedure gurus. Understanding the fuss requires some background on the two main ways to carry out a worker-classification issue.

The two principal ways, in grossly oversimplified terms, for a taxpayer to challenge a worker-classification issue are the following. On one hand, the taxpayer can wait for the IRS to conclude its audit and issue the Examination Report, agree to the immediate assessment of employment taxes, pay the requisite amount, file a refund claim with the IRS, and when the IRS disallows such claim, file a Complaint with the proper U.S. District Court. On the other hand, the taxpayer can wait for the IRS to issues its Examination Report, file a Protest Letter with the IRS and dispute the issue with the Appeals Office, and when the Appeals Officer supports the Revenue Agent's earlier determination that the workers should really be treated as employees instead of independent contractors, file a timely Petition in the Tax Court. The significance of the difference between these two procedures becomes clear below.

The Code generally provides that a business whose workers the IRS proposes to reclassify as employees can file a grievance with the Tax Court, called a "Petition for Redetermination of Employment Status Under Code Section 7436," challenging such reclassification within 90 days after the IRS issues the Notice of Determination of Working Classification.[39] If the business exercises this right, then the IRS cannot immediately assess the proposed employment taxes. This concept is derived from two tax provisions. First, Code Sec. 6213(a) contains the general timing-of-assessment rules applicable to most tax deficiency cases. It states the following:

> Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in Code Sec. 6212 is mailed ... the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. *Except as otherwise provided in*

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> *Code Sec. 6851, 6852, or 6861, no assessment of a deficiency ... shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.*[40]

Second, Code Sec. 7436(d)(1) indicates that the principles of several tax provisions, including Code Sec. 6213(a), apply to worker-classification cases before the Tax Court in the same manner as if the Notice of Determination of Worker Classification (issued by the IRS in worker-classification disputes) constitutes a Notice of Deficiency (issued by the IRS in other tax disputes).[41] Together, Code Sec. 6213(a) and Code Sec. 7436(d)(1) confirm that a business that opts to fight the IRS in Tax Court can effectively prevent the "assessment" of any employment taxes until after the litigation has become final, which normally is months after the initial Petition is filed with the Tax Court, and many years after the filing deadline for the Forms 1099 and Forms 1096 for the years in dispute.

The effect of these two tax provisions is beyond doubt. Lending support is the legislative history, which states that the Senate Finance Committee "believes it is appropriate to permit judicial review of a reclassification case *before assessment of employment taxes* and the filing of tax liens."[42] Support can also be gleaned from Notice 2002-5, containing procedures related to Code Sec. 530 relief in Tax Court cases. This IRS pronouncement states the following:

> Restrictions on Assessment—Code Sec. 7436(d)(1) provides that various restrictions on assessment in Code § 6213 apply in the same manner as if a notice of deficiency had been issued. *Thus, after the Notice of Determination [of Worker Classification] is mailed, the Service is precluded from assessing the taxes identified in the Notice of Determination prior to expiration of the 90-day period during which the taxpayer may file a timely Tax Court petition.* If the taxpayer does not file a timely Tax Court petition before the 91st day after the Notice of Determination was mailed, the employment taxes identified in the Notice of Determination shall thereafter be assessed.[43]

Combining the preceding rules about assessment with the holding in *Bruecher Foundation Services* yields interesting possibilities. The Fifth Circuit held that a taxpayer cannot satisfy the Reporting Consistency requirement of Code Sec. 530 if it files Forms 1099 for the workers after the IRS has "assessed" the employment taxes. Stated in the converse, a taxpayer has Reporting Consistency as long as it files Forms 1099 before the IRS "assesses" the taxes. A taxpayer, therefore, has Reporting Consistency even if it files Forms 1099 during an audit, *i.e.*, after the IRS has challenged worker-classification issues but before it has "assessed" the related employment taxes.

Bruecher Foundation Services involved a dispute carried out in the District Court after the IRS had assessed the taxes and the taxpayer had paid the required amount; the case did not feature a pre-assessment battle in Tax Court. Thus, construing the case narrowly, one could argue that a taxpayer has Reporting Consistency, provided that it files the Forms 1099 (1) before the IRS completes the audit and the taxpayer agrees to the assessment by executing the Examination Report, or (2) within the 90-day period after the IRS issues the Notice of Determination of Worker Classification. The ruling in *Bruecher Foundation Services* might even have broader significance, though, because it was not crafted so restrictively as to exclude its possible application to cases held in Tax Court. Accordingly, one might conceivably argue that, based on the language of *Bruecher Foundation Services*, a taxpayer can meet the Reporting Consistency requirement by filing Forms 1099 for the workers at any time before the end of the related Tax Court litigation because, thanks to Code Sec. 6213(a) and Code Sec. 7436(d)(1), the employment taxes cannot be "assessed" until the Tax Court's opinion has been finalized.

Assessing the Weight of Unpublished Decisions

Bruecher Foundation Services appears to be only the second case specifically addressing the issue of whether taxpayers must file timely Forms 1099 in order to preserve their eligibility for Code Sec. 530 relief. Nevertheless, the Fifth Circuit issued an "unpublished" opinion. It appears that the Fifth Circuit did not appreciate the significance of its ruling on Reporting Consistency under Code Sec. 530. A close reading of the Fifth Circuit's opinion clarifies why the court opted to relegate this case to the "unpublished" category: (1) The ultimate issue, whether the workers were employees or independent contractors, was decided by applying the fact-intensive 20 factors to

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the unique workers of the Company, and (2) the Fifth Circuit was reluctant to issue an opinion that might be interpreted to mean that all construction workers should be treated a certain way for tax purposes. In the words of the Fifth Circuit, "this opinion addresses only the particular and perhaps peculiar facts of this case. We do not opine whether all construction workers are employees or independent contractors. We do not see this case presenting the nationwide, far-reaching implications threatened by [the Company]. If the facts were different, the result might be different—no more no less."[44]

Businesses and tax practitioners might like to minimize the importance of *Bruecher Foundation Services* because of the detrimental effect on the Company and others in its shoes, but doing so would be rash. This is because the potential use and value of "unpublished" decisions is surprisingly broad.

Federal Rules of Appellate Procedure Rule 32.1(a) generally provides that a court may not prohibit or restrict a party from citing federal judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent" or the like. Moreover, the Advisory Committee Notes to Rule 32.1 state the following:

> Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court ... Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

The preceding procedural rule and related commentary create ambiguity regarding how much weight *Bruecher Foundation Services* might carry in the future, but, given the high rate of worker-classification disputes and the percentage of businesses that file late Forms 1099, its value should not be underestimated solely based on its "unpublished" status.

Prejudice Suffered by Uninformed Taxpayers

As explained above, Code Sec. 530(e)(1), legislative history, the Internal Revenue Manual, the IRS's worker-classification training materials and IRS new releases are unified in mandating that Revenue Agents give taxpayers information about Code Sec. 530 relief at the beginning of all worker-classification audits. There was no dispute in *Bruecher Foundation Services* that the Revenue Agent failed to meet his notification duty, yet the District Court and Fifth Circuit both refused to grant the Company a judicial remedy because it failed to show that it had suffered actual damages. This ruling is noteworthy to those intimately familiar with worker-classification disputes as they likely would have argued that the Company's ignorance about Code Sec. 530, coupled with the Revenue Agent's failure to provide the requisite enlightenment, damaged the Company in at least two ways. These two types of injuries are described below.

Inability to Get Benefits of the Classification Settlement Program

In 1996, the IRS issued a news release announcing the so-called classification settlement program (CSP) and identifying it as a two-year trial.[45] At the end of this initial period, in 1998, the IRS decided to extend the CSP indefinitely because both an internal review and public comments indicated that it was achieving its goal of resolving worker-classification cases at any early stage.[46] Details about the CSP are somewhat challenging to find because they derive primarily from a Field Service Advisory in 1996, as restated and expanded in the Internal Revenue Manual.[47] The description of the CSP, below, comes from these two sources.

In cases where it appears that a business may have misclassified a worker, the Revenue Agent must fully develop the issue and determine, among other things, whether the business is eligible for Code Sec. 530 relief, and, if not, whether the business is entitled to a CSP offer.[48] If the Revenue Agent and his superiors conclude that a CSP offer is in order, they must decide which of two "graduated settlement offers" the IRS will make.

In situations where the business had Reporting Consistency, but clearly lacked either Substantive

Consistency or a Reasonable Basis, the CSP offer entails assessment of 100 percent of the employment tax liability for the one tax year under audit, computed using the special rates under Code Sec. 3509, if applicable ("One-Year-100-Percent Offer"). The second offer is better for businesses. In cases where the business had Reporting Consistency and has a "colorable argument" that it also had Substantive Consistency or a Reasonable Basis, the CSP offer contemplates assessment of just 25 percent of the employment tax liability for the one tax year under audit, computed using the special rates under Code Sec. 3509, if applicable ("One-Year-25-Percent Offer").[49] Under both scenarios, the business must agree to reclassify the workers as employees going forward.[50] Notably, the threshold question for the IRS before presenting a One-Year-100-Percent Offer or a One-Year-25-Percent Offer is whether the business has Reporting Consistency, *i.e.*, whether the business filed timely Forms 1099 for the workers.

To grasp the benefit of the two CSP offers, one must look beyond the INTERNAL REVENUE MANUAL to two relatively obscure tax provisions: Code Sec. 3509 and Code Sec. 6205.

Reduced Tax Rates Under Code Sec. 3509

In 1982, Congress realized that three "major problems" existed with the forcing a business to reclassify its workers as employees: (1) The business could be assessed income taxes, FICA taxes, and FUTA taxes for all years still open under the statute of limitations; (2) overpayments of federal income taxes might occur if the business were obligated to pay these amounts in situations where workers personally paid them earlier *via* estimated tax payments or with their individual income tax returns; and (3) overpayments of FICA taxes could occur, too, if the business were required to pay these amounts in cases where the workers already did so through self-employment taxes.[51] Congress understood that, in the case of a forced reclassification, the IRS generally would adjust/lower assessments for the business's failure to withhold, to the extent that it could furnish certificates, signed by those workers who were reclassified, showing that the workers had personally paid the taxes.[52] However, Congress underscored the practical challenges associated with this supposed clemency by the IRS: Obtaining certificates would be a "difficult burden" and a "serious retroactive tax burden" on a business in cases involving jobs with high turnover rates, or where workers were numerous, uncooperative, and/or poor record-keepers.[53]

In light of this reality, Congress enacted Code Sec. 3509, which was hailed as a new procedure in worker-classification cases designed to substantially simplify the law, reduce burdens on businesses, approximate the average tax liability of a business after assuming certain levels of tax compliance by individual workers who were reclassified, and punish the business for its violations.[54]

Let's see how Code Sec. 3509 functions. As mentioned above, both the One-Year-100-Percent Offer and the One-Year-25-Percent Offer indicate that the liability for the year in question might be calculated under the special rates found in Code Sec. 3509. When a business incorrectly treats an employee as an independent contractor, it is liable for the employee's federal income tax withholding and the employee's share of FICA taxes, not to mention the business's share of the FICA taxes and unemployment taxes.[55] Assuming that the business did not intentionally disregard its duty to withhold, Code Sec. 3509(a) sets the following level of payback to the IRS: In situations where the business filed annual Forms 1099 for the workers, the company is only obligated to pay (1) federal income tax withholding calculated as 1.5 percent of the worker's total wages, (2) 20 percent of the employee's share of FICA, and (3) 100 percent of the company's share of FICA.[56] Below is an example from the IRS using the FICA rates for 2011.[57]

Table 1.

Code Sec. 3509(a) Example	Percentage
Business's share of FICA	7.65%
20% of employee's share of FICA	1.13%
Federal income tax withholding	1.50%
Total under Code Sec. 3509(a)	**10.28%**

Interest-Free Payments Under Code Sec. 6205

As explained above, a business agreeing to resolve a worker-classification case under the CSP limits its exposure to the one year under audit by the IRS, avoids penalties, and, depending on the circumstances, enjoys the reduced rates under Code Sec. 3509. Settling under the CSP could trigger one more benefit for a business, interest waiver. The intricacies of the relevant provision, Code Sec. 6205, far exceed the scope of this article, but it is important to be aware of its existence and basic function. Code Sec. 6205 and the regulations thereunder contain

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rules allowing for "interest-free adjustments" under certain circumstances.[58] These rules have been liberally interpreted by the IRS, such that most businesses that concede worker-classification cases under the CSP avoid interest charges.[59]

As noted above, the IRS will not even make a CSP settlement offer to a business unless it first convinces the Revenue Agent conducting the audit that it had Reporting Consistency. Additionally, the limited guidance from the IRS about the CSP indicates that the settlement offer must be accepted by the business at the end of the audit or during the Appeals Conference.[60] Thus, if the Revenue Agent neglects his duty to inform the business at the commencement of an audit about the existence, requirements, and benefits of Code Sec. 530, and/or if the IRS disregards *Medical Emergency Care Associates* and takes the position during the audit that a business that files late Forms 1099 lacks Reporting Consistency, then such business might now know about the CSP until it is too late. In other words, if the business did not learn about Code Sec. 530 until the IRS issued its Notice of Determination of Worker Classification after the Appeals Conference, it would be divested of the opportunity to take advantage of a favorable CSP settlement offer (*i.e.*, the One-Year-100-Percent Offer or the One-Year-25-Percent Offer), reduced tax rates under Code Sec. 3509, and interest-free payments under Code Sec. 6205. This arguably constitutes the type of prejudice or deprivation of due process rights that the courts found lacking in *Bruecher Foundation Services.*

Inability to Recoup Fees from the IRS

Another illustration of the damage caused by a Revenue Agent's failure to inform taxpayers about Code Sec. 530 relief at the start of a worker-classification audit concerns the ability of taxpayers to recoup certain fees from the IRS under Code Sec. 7430.[61]

Generally, the "prevailing party" in any administrative proceeding before the IRS or in any tax litigation brought by or against the government in connection with the determination, collection, or refund of any tax, interest, or penalty may be awarded reasonable administrative and/or litigation costs.[62] Recoverable administrative costs may include charges imposed by the IRS, reasonable attorneys' fees, reasonable expenses for expert witnesses, and reasonable costs of any study, analysis, report, test or project necessary for the preparation of the taxpayer's case.[63] The litigation costs for which the taxpayer may seek reimbursement follow similar guidelines.[64]

The term "prevailing party" generally means a party in any tax-related administrative proceeding or litigation that (1) has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented, and (2) has a net worth that does not exceed certain statutory thresholds.[65] Even if the taxpayer substantially prevails and meets the net worth requirement, the taxpayer will not be deemed the "prevailing party" if the government establishes that its position was "substantially justified."[66] In other words, if the government manages to prove that the position it took during the administrative dispute or litigation was substantially justified, then the taxpayer is precluded from recovering costs. Understanding what constitutes a substantial justification, therefore, is paramount.

The regulations explain that the government's position is substantially justified only if it has a reasonable basis in both fact and law.[67] A significant factor in making this determination is whether the taxpayer presented all of the relevant information under its control to the appropriate IRS personnel.[68] This seems logical because a taxpayer should have little room to complain about the government's position when the taxpayer fails to provide the information, documentation, and arguments necessary to support its own stance. Along with the regulations, case law is helpful in identifying what represents substantial justification. Certain courts have developed a framework, a nonexhaustive list of factors to be considered. Among these factors are (1) the stage at which the issue or litigation is resolved, (2) the opinions of other courts on the same underlying issues, (3) the legal merits of the government's position, (4) the clarity of the governing law, (5) the foreseeable length and complexity of the litigation, and (6) the consistency of the government's position.[69] Other courts have utilized a different approach, scrutinizing whether the position taken by the IRS was reasonable.[70] These courts hold that a position is substantially justified if it is "justified to a reasonable degree that could satisfy a reasonable person or that has a reasonable basis in both law and fact."[71] Still other courts rely on a different test, presenting the question as whether the government knew or should have known that its position was invalid at the time it took it.[72]

If a Revenue Agent fails to inform a taxpayer about potential relief under Code Sec. 530 at the beginning of a worker-classification audit, particularly a business not advised by adequate tax counsel, then such

business likely will not present to the Revenue Agent at the earliest stages of the audit organized, thorough documentation to strengthen its case of having Reporting Consistency, Substantive Consistency, and a Reasonable Basis for treating the relevant workers as independent contractors. Moreover, an uninformed and underrepresented business surely would not know to search for and supply to the Revenue Agent precedent, like *Medical Emergency Care Associates*, supporting the notion that Reporting Consistency does not require a business to file "timely" Forms 1099. The business, consequently, would not be able to demonstrate that the IRS lacked "substantially justification" for its reclassification position until much later in the tax dispute. Thus, even if the business ultimately were to win the worker-classification issue and be deemed the "prevailing party," the Revenue Agent's violation of his duty to provide information about Code Sec. 530 relief at the outset would deprive the business of a certain amount of fee recovery under Code Sec. 7430. This seemingly represents the type of prejudice that the courts found missing in *Bruecher Foundation Services.*

Conclusion

One need not be Nostradamus to make these predictions: The IRS will conduct numerous worker-classification audits in the future; In doing so, the IRS will adhere to its traditional position that taxpayers are not entitled to Code Sec. 530 relief unless they filed "timely" Forms 1099 for the workers; and Certain Revenue Agents will fail to notify taxpayers about Code Sec. 530 relief at the beginning of an audit, despite the clear legal and administrative mandate in this regard. Armed with the information in this article, taxpayers and their advisors should be well equipped to face this reality and triumph on issues of Reporting Consistency, avoid prolonged audits, and, where feasible, maximize fee reimbursement from the IRS.

Endnotes

1 *Bruecher Foundation Services, Inc.,* CA-5, 2010-1 USTC ¶50,476, 383 FedAppx 381 (2010).
2 Act Sec. 530 of the Revenue Act of 1978 (P.L. 95-600) (1978).
3 S. Rep. 95-1263, 95th Cong. 2d Sess. (1978), at 209–11.
4 Code Sec. 530(a)(1); Rev. Proc. 85-18.
5 Code Sec. 530(a)(1) (emphasis added).
6 S. Rep. 95-1263, 95th Cong., 2nd Sess. (1978) (emphasis added).
7 S. Rep. 104-281, 104th Cong., 2nd Sess., 24 (1996) (emphasis added).
8 Code Sec. 6041; Reg. §1.6041-1; Reg. §1.6041-6.
9 Rev. Proc. 85-18, 1985-1 CB 518.
10 *See* TAM 8251012 (Sept. 7, 1982), TAM 8302008 (Sept. 28, 1982), TAM 8322005 (Feb. 21, 1983), TAM 8403002 (Sept. 9, 1983), TAM 8424005 (Feb. 24, 1984) and TAM 8703002 (Aug. 27, 1986).
11 IRM §4.23.5.2.2.1 (Nov. 3, 2009).
12 *See* P.L. 95-600, Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248), Tax Reform Act of 1986 (P.L. 99-514) and Small Business Job Protection Act of 1996 (P.L. 104-188).
13 Act Sec. 530(e)(1) of P.L. 95-600; Act Sec. 1122 of P.L. 104-188.
14 H. Conf. R. 104-737, 104th Cong., 2d Sess., 203 (1996).
15 H. Conf. R. 104-737, 104th Cong., 2d Sess., 204 (1996).
16 IRM §4.23.5.2.1 (Feb. 1, 2003) (emphasis in original).
17 IRS, *Independent Contractor or Employee? Training Materials,* Training 3320-102 (1996), at 1–5.
18 IRS News Release 96-44 (Oct. 30, 1996).
19 *Id.*
20 The documents obtained and reviewed by the author include the Complaint filed May 19, 2006, Answer filed July 26, 2006, Plaintiff's Motion for Partial Summary Judgment filed October 19, 2006, Government's Response to Plaintiff's Motion for Partial Summary Judgment filed December 15, 2006, Memorandum Opinion and Order Denying Plaintiff's Motion for Partial Summary Judgment filed May 3, 2007, Government's Motion for Summary Judgment filed August 15, 2007, Findings of Fact and Conclusions of Law by District Court issued February 10, 2009, and the Decision by Fifth Circuit Court of Appeals issued June 18, 2010.
21 *Nu-Look Design, Inc.,* 85 TCM 927, Dec. 55,059(M), TC Memo. 2003-52, *aff'd,* CA-3, 2004-1 USTC ¶50,138, 356 F3d 290, 294, note 1 (2004). *See also Colorado Mufflers Unlimited, Inc.,* 94 TCM 154, Dec. 57,042(M), TC Memo. 2007-222; *Water-Pure Systems, Inc.,* 85 TCM 934, Dec. 55,060(M), TC Memo 2003-53; *Veterinary Surgical Consultants, P.C.,* 85 TCM 901, Dec. 55,055(M), TC Memo. 2003-48.
22 The relevant case, *Medical Emergency Care Associates, S.C.,* 120 TC 436, Dec. 55,154 (2003), was not cited by the Company in its Motion for Partial Summary Judgment or by the government in its Response thereto. To the best of the author's knowledge, the only place that the case appears is in a string cite in the Memorandum Opinion and Order issued by the U.S. District Court supporting the proposition that the filing of Forms 1099 by a taxpayer only after the IRS challenges the classification of its workers fails to demonstrate the "good faith" that Congress envisioned when requiring that a taxpayer file the appropriate tax returns.
23 *Medical Emergency Care Associates, supra* note 22.
24 *Id.*
25 H. Rept. No. 178 (95th Cong., 2nd Sess., 5 (1978); IRM §4.23.5.2.1 (Feb. 1, 2003); *Medical Emergency Care Associates, supra* note 22.
26 *Medical Emergency Care Associates, supra* note 22.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 Code Sec. 6721(a).
32 *Medical Emergency Care Associates, supra* note 22.
33 *Id.*
34 *Id.*
35 Code Sec. 7463(f)(2); Tax Court Rule 170.
36 Code Sec. 7463(b).
37 *B. Stratmore,* 48 TCM 1369, Dec. 41,551(M), TC Memo. 1984-547.
38 *S.R. Nico,* 67 TC 647, 654, Dec. 34,205 (1977).
39 Code Sec. 7436(a), (b); Tax Court Rules 290-291; Notice 2002-5, 2002-1 CB 320.
40 Code Sec. 6213(a) (emphasis added).
41 Code Sec. 7436(d)(1).
42 S. Rep. 97-494, 97th Cong., 2nd Sess. (1982) (emphasis added).

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[43] IRS Notice 2002-5 (emphasis added).
[44] *Bruecher Foundation Services, Inc., supra* note 1.
[45] IRS News Release 96-7 (Mar. 5, 1996).
[46] Notice 98-21, 1998-1 CB 849.
[47] FS-96-5; IRM §4.23.6.
[48] FS-96-5; IRM §4.23.6.11 (Mar. 1, 2003).
[49] FS-96-5; IRM §4.23.6.13.1 (Oct. 30, 2009).
[50] FS-96-5; IRM §4.23.6.13.1 (Oct. 30, 2009).
[51] S. Rep. 97-494(I), 97th Cong., 2d Sess. (1982), at 1103.
[52] S. Rep. 97-494(I), 97th Cong., 2d Sess. (1982), at 1104.
[53] S. Rep. 97-494(I), 97th Cong., 2d Sess. (1982), at 1103–04.
[54] S. Rep. 97-494(I), 97th Cong., 2d Sess. (1982), at 1104.
[55] The legislative history leaves no doubt that, even if the company is entitled to the reduced rates under Code Sec. 3509 for taxes not withheld and remitted to the IRS on behalf of the workers, the company remains fully liable for its own employment tax obligations. The relevant Congressional report states that "[e]ven if this procedure applies, the employer still will be liable for the employer's share of FICA taxes and FUTA taxes." S. Rep. 97-494(I), 97th Cong., 2d Sess. (1982), at 1105.
[56] Code Sec. 3509(a); IRM §4.23.8.5.1 (June 7, 2011).
[57] IRM §4.23.8.5.1 (June 7, 2011).
[58] Code Sec. 6205; Reg. §31.6205-1.
[59] Rev. Rul. 75-464, 1975-2 CB 474, *obsoleted by* Rev. Rul. 2009-39, IRB 2009-52, Dec. 10, 2009. The regulations and IRS pronouncements clarify that a company that refuses to accept the CSP offer can still have an "interest-free adjustment," provided that it makes a cash bond deposit before receiving a Notice of Determination. *See* Reg. §31.6205-1(a)(6)(ii) and Rev. Rul. 2009-39.
[60] IRM §4.23.6.13.6 (Oct. 30, 2009).
[61] *See, e.g., Images in Motion El Paso, Inc.,* 91 TCM 716, Dec. 56,425(M), TC Memo. 2006-19, wherein the taxpayer recouped litigation costs because, among other things, it was "unreasonable" in light of the evidence presented during audit for the Revenue Agent to conclude that the taxpayer did not qualify for Code Sec. 530 relief.
[62] Code Sec. 7430(a).
[63] Code Sec. 7430(c)(2).
[64] Code Sec. 7430(c)(1).
[65] Code Sec. 7430(c)(4)(A).
[66] Code Sec. 7430(c)(4)(B)(i).
[67] Reg. §301.7430-5(c)(1).
[68] Reg. §301.7430-5(c)(1); Reg. §301.7430-5(h), Example 1.
[69] *National Fed'n of Republican Assemblies,* DC-AL, 2003-1 USTC ¶50,249, 263 FSupp2d 1372, 1378 (2003).
[70] *See, e.g., R.C. Kennedy, Sr.,* 89 TC 98, Dec. 44,046 (1987) (holding that the IRS's position was unreasonable where it acted contrary to its own regulations, contrary to case law, and without factual support).
[71] *N.R. Wilkes, Jr.,* CA-11, 2002-1 USTC ¶60,438, 289 F3d 684, 688 (2002).
[72] *See, e.g., M.J. Downing,* 89 TCM 1009, Dec. 55,983(M), TC Memo. 2005-73.

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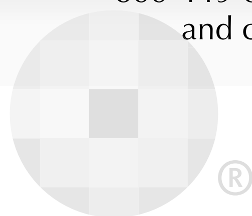

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