

Publication 3953:

Questions and Answers
About Tax Court and the Notice of
Employment Tax Determination
Under IRC § 7436



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Introduction

In this publication, the Internal Revenue Service (“Service”) provides you with general information that may be helpful when you receive a Notice of Employment Tax Determination Under IRC § 7436. If you wish to discuss your particular situation with someone at the Service, call the person whose name and telephone number appear on the first page of the Notice of Employment Tax Determination Under IRC § 7436.

You can get information about all aspects of the Tax Court’s proceedings on the Tax Court’s website at www.ustaxcourt.gov or by writing to the Tax Court at

United States Tax Court
400 Second Street, NW
Washington, DC 20217

Please note that contacting either the Service or the Tax Court does not extend the deadline by which you must file a Tax Court petition (if you choose to file one). (For more information on this, see Question 4 “When is the deadline for filing a Tax Court petition?”.)

1. What is a Notice of Employment Tax Determination Under IRC § 7436?

The Notice of Employment Tax Determination Under IRC § 7436 (“Notice of Employment Tax Determination”) is your legal notice that you may begin a proceeding in the United States Tax Court. The Notice of Employment Tax Determination notifies you of your right to go to Tax Court, but you may choose not to do so. (See question 8, “What happens if you decide not to file a Tax Court petition?”)

“Employment tax” includes tax imposed under the Federal Insurance Contributions Act (FICA) (both the Old Age, Survivors, Disability Insurance (OASDI) portion of FICA and the Hospital Insurance (HI) portion of FICA, commonly called the “social security” and the “Medicare” portions of FICA), the Federal Unemployment Tax Act (FUTA), the Railroad Retirement Tax Act (RRTA), and/or federal income tax withholding (FITW).

The date on which the Notice of Employment Tax Determination is mailed by certified or registered mail begins the time period during which you may file a petition in Tax Court asking that court to redetermine some or all of the Service’s determinations set forth in the Notice of Employment Tax Determination.

2. When does the Service issue a Notice of Employment Tax Determination?

The Service issues a Notice of Employment Tax Determination after making one or more of the following determinations. EMPLOYMENT STATUS. The Service has determined that

one or more individuals who provide services to you should be legally classified as your employees.

NO RELIEF UNDER SECTION 530. The Service has determined that you do not satisfy the statutory requirements to qualify for relief under section 530(a) of the Revenue Act of 1978 (section 530).

THE RELIEF DESCRIBED IN SECTION 530 IS NOT APPLICABLE. The service has determined that the relief described in section 530 is not applicable.

AMOUNT OF EMPLOYMENT TAX. Based on one or more of these determinations, the Service has determined the amount of additional employment tax, additions to tax, and penalties.

3. Can these determinations be reviewed?

If the Service mailed you a Notice of Employment Tax Determination, you may, within a period of time established by law, begin a proceeding for review of the Service’s determinations by filing a petition in the United States Tax Court. In that proceeding, you ask the Tax Court to make an independent determination whether the Service was correct when it made the determinations set forth in the Notice of Employment Tax Determination. In making its decision, the Tax Court takes a fresh look at the issues. You must produce evidence for the court to consider, even if you previously provided it to the Service during the audit.

4. When is the deadline for filing a Tax Court petition?

If the Service sent you a Notice of Employment Tax Determination by certified or registered mail, the time you have to file a petition with the Tax Court is set by law and cannot be extended or suspended. Thus, contacting the Service or the Tax Court for more information, or receiving other correspondence from the Service, will not change the period for filing a petition with the Tax Court.

Generally, you must file the petition with the Tax Court before the 91st day after the date the Notice of Employment Tax Determination was mailed by certified or registered mail. For special rules governing how a bankruptcy proceeding affects the deadline, see question 10, “What effect do bankruptcy proceedings have in the Tax Court?”

The petition will be considered timely filed if it is filed by the date indicated on the first page of the Notice of Employment Tax Determination under the heading, “Last Date to Petition Tax Court.” The petition is considered timely filed if the postmark date (either by the U.S. Postal Service or a designated private delivery service) falls within the period described above for filing a petition.

5. How do you file a Tax Court petition?

You can get information about filing a petition with the Tax Court and other Tax Court procedures on the Tax Court's website at www.ustaxcourt.gov or by writing to the Tax Court at

United States Tax Court
400 Second Street, NW
Washington, DC 20217

You should act promptly if you intend to file a petition with the Tax Court.

If you file a petition with the Tax Court related to the Notice of Employment Tax Determination and you use the form petition on the Tax Court website, check the box for "Determination of Worker Classification" on page 1 of the petition.

Timely send the completed petition, a copy of the Notice of Employment Tax Determination, and a copy of all statements and/or schedules you received with the Notice of Employment Tax Determination (but not this publication) to the Tax Court at the above address.

6. Who may represent you in the Tax Court?

You may be represented by anyone admitted to practice before the Tax Court. In addition, if you are an individual, you may represent yourself before the Tax Court. If you are a corporation or unincorporated association, you may be represented by an authorized officer of the corporation or by an authorized member of the association. If you are an estate or trust, you may be represented by your fiduciary. More information on who is admitted to practice before the Tax Court and other Tax Court procedures can be found on the Tax Court's website at www.ustaxcourt.gov.

7. Is an election to use the Tax Court's simplified "small case procedures" available?

Yes. The Tax Court has simplified "small case procedures". You may elect those simplified procedures when the amount in dispute (including tax, additions to tax, and penalties) is \$50,000 or less for each calendar quarter involved. The Service also has the right to oppose the election.

You can get more information about the simplified procedures and how that election affects your appeal rights on the Tax Court's website at www.ustaxcourt.gov, or by writing to the Tax Court at:

United States Tax Court
400 Second Street, NW
Washington, DC 20217

8. What happens if you decide not to file a Tax Court petition?

If you decide not to file a petition with the Tax Court, you can sign the waiver form (Form 2504-T enclosed with the Notice of Employment Tax Determination) to limit the accumulation of interest. Return it to the Service at the IRS address on the top of the first page of the Notice of Employment Tax Determination. By signing Form 2504-T, you are agreeing to the proposed assessment. This will permit the Service to assess the proposed assessment quickly and can help limit the accumulation of interest.

If you decide not to sign and return the waiver, and you do not file a petition with the Tax Court within the time limit, the law requires the Service to assess the proposed employment tax, additions to tax, and/or penalties, plus the interest required by law, and bill you for the assessment after 90 days from the date of the Notice of Employment Tax Determination.

If you do not file a Tax Court petition within the allotted time, you still may seek judicial review of the Service's employment tax determinations by filing a refund suit in United States District Court or in the Court of Federal Claims. Please note that before a refund suit can be filed, you must pay to the IRS the amount of employment tax that relates to one worker for one tax period and file a claim for refund with the IRS. If the claim for refund is denied (or the IRS does not respond to the refund claim for six months), you may file a refund suit in United States District Court or the United States Court of Federal Claims and challenge the employment tax assessment. For more information about the refund process, see Pub 5146, Employment Tax Returns: Examinations and Appeal Rights

9. What is your liability for interest?

By law, interest accrues on any underpayment of tax that is not timely paid. Interest accrues on the underpayment of tax, additions to tax, penalties, and accrued interest.

If you are a C-corporation and you have an underpayment of \$10,000 or more, section 6621(c) of the Internal Revenue Code requires that the Service charge you an interest rate two percent higher than the normal rate.

10. What effect do bankruptcy proceedings have in the Tax Court?

BANKRUPTCY PROCEEDINGS BEGUN BEFORE A NOTICE OF EMPLOYMENT TAX DETERMINATION IS MAILED. If you are in bankruptcy and the automatic stay under Bankruptcy Code section 362(a) is in effect as of the date of the Notice of Employment Tax Determination, you are prohibited from filing a petition with the Tax Court while the automatic stay is in effect. If you nevertheless file a Tax Court petition while the automatic stay is in effect, the Tax Court petition will be completely void. You may ask the Bankruptcy Court to lift

the stay so you can file a petition with the Tax Court, or, once the automatic stay is no longer in effect by operation of law, you may then file a Tax Court petition. Once the automatic stay is lifted by the Bankruptcy Court or terminated by operation of law, you must calculate the deadline for filing the Tax Court petition as follows: the petition must be filed before the 151st day after the date the automatic stay is terminated. We suggest that you file your Tax Court petition as soon as possible after the Bankruptcy Court lifts the automatic stay or the automatic stay is no longer in effect by operation of law.

BANKRUPTCY PROCEEDINGS BEGUN AFTER A NOTICE OF EMPLOYMENT TAX DETERMINATION IS MAILED BUT BEFORE TAX COURT PETITION IS FILED. If you file a bankruptcy petition after the date of the Notice of Employment Tax Determination but before filing a Tax Court petition, you are precluded from filing a Tax Court petition while the automatic stay under Bankruptcy Code section 362(a) is in place. If you nevertheless file a Tax Court petition while the automatic stay is in effect, the Tax Court petition will be completely void. Once the automatic stay is lifted by the Bankruptcy Court or terminated by operation of law, you must calculate the deadline for filing a Tax Court petition as follows:

the period for filing a Tax Court petition (before the 151st day) after the date the automatic stay is terminated

is reduced by

the number of days between the date of the Notice of Employment Tax Determination and the date the bankruptcy petition was filed.

Example. The Notice of Employment Tax Determination is sent to you by certified mail on May 1, 2017. You file a bankruptcy petition in the Bankruptcy Court on June 1, 2017. You ask the Bankruptcy Court to lift the automatic stay. On June 18, 2017, the Bankruptcy Court lifts the automatic stay so that you can file a petition. When would be the last day by which you could timely file your Tax Court petition?

First, you must calculate the 151st day after the date the automatic stay is lifted. The 151st day after June 18, 2017, is November 16, 2017.

Then, from that date, you must reduce the number of days that elapsed from the date of the Notice of Employment Tax Determination to the date you filed your bankruptcy petition. Thirty-one days elapsed between May 1, 2017 and June 1, 2017. Thus, the deadline for filing the Tax Court petition would be thirty-one days before November 16, 2017. That date would be October 16, 2017. So, the Tax Court petition would have to be filed before October 16, 2017, which means that the petition must be filed no later than October 15, 2017.

We suggest that you file your Tax Court petition as soon as possible after the Bankruptcy Court lifts the automatic stay or the automatic stay is no longer in effect by operation of law.

11. How do you contact a Taxpayer Advocate?

If you have questions/concerns about the Notice of Employment Tax Determination, first contact the person whose name and telephone number appear at the top of the first page of the Notice of Employment Tax Determination. This person can directly access your tax information and help you get answers.

Do you want assistance by a Taxpayer Advocate? This assistance is not a substitute for established IRS procedures, formal Appeals processes, or filing a petition with the Tax Court. The Taxpayer Advocate cannot reverse legal or technically correct tax determinations, nor extend the time allowed by law to file a petition in the United States Tax Court. However, the Taxpayer Advocate can give your tax matter proper and prompt handling when unresolved through normal channels. You can call toll-free 1-877-777-4778 and ask for Taxpayer Advocate assistance, or visit <https://www.irs.gov/advocate/local-taxpayer-advocate/contact-your-local-taxpayer-advocate> for the telephone number of the Taxpayer Advocate for the IRS office that issued the Notice of Employment Tax Determination .