

Session 4

The Voluntary Classification Settlement Program (2019)

1. The employee vs. independent contractor war rages on
 - a. Benefits of ICs to business owners
 1. Workforce flexibility
 2. Limits on liability
 3. Non-applicability of state, federal labor laws
 4. No Obama Care issues
 5. Reduced state, federal taxes
 - b. Problems for the IRS
 1. Contributes to the tax gap
 2. No withholding safety net
 3. Failure to provide information returns
2. Key factor that drives the war
 - a. Lack of definition of “employee”
 1. IRS uses “common law” 20-factor definition of Rev. Rul. 87-41
 - b. Lack of “bright line” creates risk of “reclassification”
 1. IRS converts ICs to employees and imposes delinquency
 - A. This is called “worker conversion”
 - B. Full liability for SS tax and employees’ income tax – §§3102(b) and 3403

2. Reduced liability if IC treatment was erroneous but not due to deliberate disregard of withholding requirements – sec 3509(a)

A. Income tax = 1.5% of wages

B. FICA tax = 20% of employee’s liability

C. Assessments double if information returns not filed – §3509(b)

i. “Reasonable cause” is a defense

3. No retroactive liability if §530, Rev. Act of 1978, applies

A. Consistently treated the workers as IC

B. Complied with Form 1099 reporting requirements

C. Reasonable basis for treating the workers as IC

3. IRS offers two Classification Settlement Programs (CSP)

a. CSP – while exam is pending – Rev. Proc. 99-28; CCA 200038045

b. Voluntary CSP (VCSP) – no exam pending – Announcement 2012-45

4. CSP: While exam is pending

a. RA determines employees were erroneously classified as ICs

b. RA determines whether §530 applies

1. “Reasonable basis” for characterizing as IC as a defense

A. Judicial precedent, published rulings, technical advice or letter ruling to the taxpayer

B. Past IRS audit and no change to IC treatment

C. Long-standing recognized practice of a significant segment of the industry – §530(a)(2)(A) – (C)

D. Statutory tests are not exhaustive –

American Inst. of Family Relations v. United States, 79-1 USTC ¶9364 (C.D. Cal. 1979)

Queensgate Dental Family Practice, Inc. v. United States, 91-2 USTC ¶50,536 (M.D. Pa. 1991), aff'd 970 F.2d 899 (3rd Cir. 1992)

Déjà vu Entertainment of Minn. v. United States, 1 F.Supp.2d 964 (D. Minn. 1998)

2. “Consistency” requirements

A. All federal tax and information returns must be filed and must be consistent with the treatment of workers as independent contractors

B. No dissimilar treatment of other workers performing similar services

3. Upon establishing a prima facie case of reasonableness, burden of proof shifts to the IRS – §530(e)(4)

c. CSP settlement offer is made based upon above factors

1. If reporting consistency is met but not substantive consistency or reasonable basis, the offer is a full employment tax assessment for one year

2. If reporting consistency is met and there is a “colorable argument” for substantive consistency and reasonable basis, the offer is an assessment of 25% of the employment tax liability for one year

A. Must treat workers as employees going forward

3. If all three requirements are clearly met, no assessment is made and the taxpayer may continue treating workers as independent contractors

5. VCSP: When no exam pending

a. Safe-harbor available without the need of waiting for exam

1. Offers certainty to businesses and workers

b. VCSP is available if:

1. Workers were consistently treated as ICs

2. All required information returns were filed for past three years

3. No current IRS employment tax audit

A. Submission of Form SS-8 by a worker is not an “audit”

4. Cannot be under audit by a state agency or the Dept of Labor

c. Terms of VCSP – See: Pub 5067, *The Voluntary Classification Settlement Program “At a Glance”*

1. Must treat workers as employees going forward

2. Pay 10% of employment tax liability for most recent tax year

A. Figured under the reduced rates of §3905

3. Enter into a Closing Agreement

A. Must make full and complete payment

4. No interest or penalty assessments

5. No employment tax audit for prior years

d. The application process for VCSP

1. File Form 8952, *Application for Voluntary Classification Settlement Program* – See attached

A. Provide information about workers to be reclassified

B. At least 60 days notice

2. IRS will not share VCSP details with states or DOL
3. Will not trigger audit if denied
4. May reapply at a later date if ineligible