

Forbes / Taxes / #TaxTime

JUN 12, 2018 @ 10:13 AM 8,339

# Tax Court Approves Of Consultant As Statutory Employee - Tax Act Makes Case Significant

**Peter J Reilly**, CONTRIBUTOR*I focus on the tax issues of individuals, businesses & more* [FULL BIO](#) ✓

Opinions expressed by Forbes Contributors are their own.

Continued from page 1

## TWEET THIS



Tax Cuts and Jobs Act has raised the stakes on the issue of whether someone is an employee or an independent contractor.



You got some people and you are paying them to do something for you. Are they employees?

## About Those Common Law Employees

You got some people and you are paying them to do something for you. Are they employees? 🐦 There is a lot more than this but probably the place to start is [Revenue Ruling 87-41](#) which gives you a 20 factor test. Well we're not going to get into that. I'll give you the executive summary. If you are asking the question, they are probably employees.

Looking at things practically, I would argue that you might want to err on the side of them being employees, even though with payroll taxes and this and that, it is probably a better deal to have independent contractors. If the IRS successfully reclassifies, it gets real ugly.

Regardless, now there is a big incentive for the "employees" to push for independent contractor status. And Mr. Fiedziuszko might be their inspiration.

## It Doesn't Take A Rocket Scientist, But That Doesn't Hurt

Mr. Fiedziuszko is a semiretired aerospace engineer. He worked for Space Systems Loral through a contract with West Valley Engineering Co. West Valley processed

his pay for Loral withholding federal income tax as well as social security and medicare. On his 2011 W-2, they checked the statutory employee box, but not on his 2012 W-2. Regardless, Mr. Fiedziuszko claimed statutory employee status:

“ Petitioners claimed deductions on Schedule C of their Form 1040 for the following expenses related to Mr. Fiedziuszko's consulting business: \$2,000 for supplies, \$5,000 for travel (including meals and lodging), \$9,500 for insurance (other than health), and \$2,000 for advertising. In addition, they claimed a \$29,540 deduction for self-employed health insurance on their 2012 Form 1040. The record contains no substantiation for these deductions other than “statements of fact” that outline Mr. Fiedziuszko's business expenses, which he prepared for trial.

### **Where Does He Fit?**

I had a little trouble figuring out how Mr. Fiedziuszko fit into the statutory employee box. His work was described this way:

“ He worked primarily from home on a satellite development project, Flexible Satellite, producing reports and components for Loral.

Judge Pugh saw that as fitting into

“ as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him


I haven't put the time in to trace down the legislative history on that definition, but it seems to go back to at least 1954 and brings to my mind images of garment workers rather than an aerospace engineer consultant. I'm wondering whether telecommuters might start using this decision as the new act makes the notion of being a statutory employee more attractive.

### **The Rest Of The Case**

Mr. Fiedziuszko did not do well on a number of other issues. It was mainly about substantiation including a classic

“ Mr. Fiedziuszko testified that when he attended church services in 2012 he typically would make a cash contribution of at least \$20. Petitioners produced

no records to substantiate these contributions and no evidence showing how often he attended church or how much he gave each time he went, other than cryptic calendar entries. While we found his testimony that he attended church and made contributions to be credible, we have no reliable evidence on which we can base an estimate of the total amount that petitioners contributed in 2012.

Next time you go to church, peek at how many pictures there are of old Andy Jackson in the plate that is passed around. Even today it seems that George Washington is our holiest president. 

## Other Coverage

Lew Taishoff has [Win On The Facts](#). Mr. Taishoff observes that Mr. Fiedziuszko may have had trouble arguing good faith on the penalties, because he was a rocket scientist. (Actually I don't know that an aerospace engineer is necessarily a rocket scientist. Likely smarter than most accountants and attorneys though.)

Bryan Camp treated the case along with three others on TaxProf Blog - [Lesson From The Tax Court: A Haunting](#). He is focusing on a procedural issue

“ In all four cases the Service asked the Tax Court to re-open the record to allow it to introduce the theretofore-unrequired-but-now-required evidence. The cases were heard by three different Tax Court judges. In two cases, the Court allowed the record to be reopened and in two cases the Court refused. Taken together, the cases illustrate how the [fallout](#) from the Tax Court's Graev decision continues to elevate procedure over substance.

[Small Business Taxes & Management](#) has a brief treatment.

I ran the decision by [Andrea Carr](#), who in my view is the best source for accounting humor, since Going Concern.. Puns are one of her specialties, she suggested "Statutory employee. Not a statue, not a Tory, only kind of an employee." I haven't seen her tweet that yet, but I can hope.

*Follow me on Twitter @peterreillycpa. Non-tax matters check out [We Are The Future Generations](#). Tax stories not quite forbes worthy on [Your Tax Matters Partner](#).*