BRADFORD TAX INSTITUTE

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Internal Revenue Manual Section 35.10.1.1.1(4)

Motions for Attorneys' Fees and Costs

1. Section 7430(a) provides that the prevailing party in any administrative or court proceeding may be awarded a judgment for:

   a. Reasonable administrative costs incurred in connection with administrative proceedings within the Internal Revenue Service, and
   b. Reasonable litigation costs incurred in connection with court proceedings.

2. A prevailing party is defined as a taxpayer who substantially prevails as to the amount in controversy or with respect to the most significant issue or set of issues. Section 7430(c)(4)(A)(i); Treas. Reg. § 301.7430–5(a)(2). A party will not be treated as the prevailing party if the government establishes that its position was substantially justified. Section 7430(c)(4)(B)(i). The Service will be found to be substantially justified where its position had a reasonable basis in both law and fact. A position is also substantially justified if the position is justified to a degree that could satisfy a reasonable person. The Service's position may be incorrect, but nevertheless be substantially justified if a reasonable person could think it correct. The taxpayer must also meet the net worth requirements of 28 U.S.C. § 2412(d)(2)(B) to meet the definition of a prevailing party.

3. For litigation costs, the position of the United States is taken by the Service as of the answer to the petition. For administrative costs, the position of the United States is taken as of the earlier of the date of the statutory notice of deficiency or the date of receipt by the taxpayer of the notice of the decision of the Appeals Office. For purposes of section 7430, the Service treats a notice of Final Partnership Adjustment (FPA), notice of Final Partnership Administrative Adjustment (FPAA), and a notice of Final S Corporation Administrative Adjustment (FSAA) the same as a statutory notice of deficiency.

4. Expansion of Authority to Award Costs and Certain Fees. The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), Pub. L. No. 105–206 modified section 7430 to allow for recoveries of reasonable administrative costs back to the date of the first letter of proposed deficiency that allows a taxpayer an opportunity of administrative review in Appeals. The point of determining the reasonableness of the Service's determination, however, has not changed. This point remains at the time the matter is finally determined by Appeals or at the time the notice of deficiency is issued. RRA98 also raised the hourly rate cap to the amount provided in the Equal Access to Justice Act, expanded the reasons available for exceeding that hourly rate cap, considered losses in other circuits to be relevant to the issue of substantial justification, allowed for the recovery of fees by pro bono representatives, and imposed a rule awarding litigation and administrative costs where the Service rejects a

"qualified offer" during the "qualified offer period" and later recovers less than the amount offered even when the Service’s position was substantially justified as long as the other requirements of section 7430 are met.

5. Section 7430 has been amended several times since its enactment. As a result of these amendments, the section applies in three different forms depending on the time period in which a case was commenced. As originally enacted, section 7430 applied to cases commenced after February 28, 1983, and before January 1, 1986. For cases commenced after December 31, 1985, with claims to be paid after September 30, 1986, the Tax Reform Act of 1986, Pub. L. No. 99–514, altered the definition of "prevailing party" under section 7430. The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100–647 (TAMRA) amended section 7430 for cases and administrative proceedings commenced after November 10, 1988.

6. Written Responses. Under T.C. Rule 232(b), respondent is to file a written response to petitioner’s motion for an award of reasonable litigation or administrative costs within 60 days after service of the motion. The court can also order respondent to file a written response to petitioner’s motion for an award of reasonable litigation or administrative costs a certain number of days earlier than 60 days after service of the motion. In those cases, Field Counsel may consider requesting an extension to allow for the time period provided for in T.C. Rule 232(b). The only situation in which a written response is not required is when respondent is fully settling the cost issue.

a. All written responses must be submitted to the Associate Chief Counsel (P&A) by email to TSS Assignments for review before filing with the court, even if the issues are not complex or the amount at issue is small. **See** Exhibit 35.11.1–1 (Issues Requiring Associate Office Review). Responses shall contain the statements required by T.C. Rule 232(b). To facilitate the preparation of the written response, early coordination with the Associate Chief Counsel (P&A) is required. It is not necessary to wait for the draft to be completed to begin coordination.

b. All written responses must be received by the Associate Chief Counsel (P&A) at least ten calendar days before they must be filed with the court. The Associate Chief Counsel (P&A) will further coordinate all attorneys’ fees motions with the Associate office(s) controlling the underlying substantive issue(s) of the case.

c. When a written response has not been filed and the court grants an award of litigation or administrative costs, Field Counsel should immediately notify the Associate Chief Counsel (P&A). Field Counsel should also consider filing a motion for reconsideration with the Tax Court. The motion for reconsideration must be received by the Associate Chief Counsel (P&A) for review at least five calendar days before it must be filed.

d. In drafting a response or a motion for reconsideration, in addition to the elements required by T.C. Rule 232(b), the response should include any matter inside or outside of the courtroom that unreasonably delayed the conclusion of the litigation, such as petitioner’s failure to comply with the court’s orders or refusal to stipulate to matters that fairly should have been stipulated.