

## RECOVERING ATTORNEY FEES FROM THE IRS WHEN SOMEONE ELSE PAYS YOUR FEES

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Under Code §7430, a taxpayer who prevails against the IRS in court (or at the administrative level) can recover his fees and costs. Restrictions on recovery exist, however. The taxpayer must have exhausted administrative remedies before going to court, the taxpayer must not unreasonably protract the proceedings, and the taxpayer must meet financial eligibility requirements. Further, no fees will be allowed when the IRS proves its position in the proceeding was substantially justified. Thus, taxpayers can only recover fees if the IRS was acting unreasonably in seeking to impose taxes.

Oftentimes, a taxpayer's employer or a related person or entity may pay his attorneys fees. The procedural history of a recent case has established that recovery of fees by the taxpayer are still available in this circumstance, but only under two limited circumstances.

Under the first of these, the taxpayer must have an absolute obligation to repay the fees to the person or entity that paid them initially, regardless of whether he successfully recovers an award of fees from the IRS. Under the second, the taxpayer must have a contingent obligation to pay the fees if he recovers an award of fees from the IRS.

This new law established in the taxpayer's case unfortunately did not help the taxpayer. The Tax Court, on remand from the appellate court to apply these rules, did not find either of the two limited circumstances to apply. While the taxpayer did assert that he had a contingent obligation to repay any fees he recovered by the IRS, there was no written evidence of such an obligation – essentially, the Court did not find sufficient evidence to find that there really was such an agreement.

The taxpayer also argued that he was obligated to pay the attorneys if the corporation that undertook to pay them could not. However, the court indicated that this does not

meet the first circumstance – the test there is only whether the taxpayer had an obligation to repay the entity paying his fees.

“In other words, the relevant inquiry is whether petitioner is indebted to Caspian for the amounts Caspian paid to counsel on his behalf. Petitioner's argument focuses incorrectly on his supposed obligation to pay the fees to counsel directly ‘if Caspian failed to pay for such services’, rather than on an obligation to repay Caspian.”

Taxpayers seeking to be able to recover fees from the IRS in these circumstances would be well served to establish in a contemporaneous writing an agreement to repay the paying entity or person, either in all circumstances or in the event of recovery from the IRS (assuming that to be the actual agreement of the parties).

*Morrison*, TC Memo 2011-76

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