

Attorneys' Fees in Tax Cases: A Look at Substantial Justification.

Section 7430 of the Internal Revenue Code provides a taxpayer with a potential recovery of attorneys' fees and other expenses incurred in tax disputes, including both administrative proceedings and judicial proceedings. It isn't a great fee shifting statute; the presumptive hourly rate for attorneys is ridiculously low at \$125 (subject to a cost of living adjustment, which brought this up to \$200 for 2015), but at least it's something.

As with most fee shifting statutes, the fee is available to a prevailing party. The government can escape liability for fees and expenses if its position was "substantially justified." I.R.C. § 7430(c)(4)(B)(i). Last week, an opinion from the Western District of North Carolina addressed this standard. *Carricker v. United States*, 2015 U.S. Dist. LEXIS 13761 (W.D.N.C. Feb. 5, 2015).

The taxpayer, Mr. Carricker, had served on the board of a non-profit; when it failed to pay the IRS taxes that were withheld from employees, he was assessed with the trust fund recovery penalty. *Carricker v. United States*, 2015 U.S. Dist. LEXIS 13761, slip op. at *1. The taxpayer secured a partial victory at the administrative level, then brought an action in district court to abate the remaining penalty, to recover payments made on account of the penalties, and to recover attorneys' fees and other administrative expenses under Section 7430.

In response, the government moved to dismiss the complaint, conceding that the taxpayer was correct on the merits of the trust fund recovery penalty and was entitled an award for his legal fees incurred in administrative proceedings, while contesting the recovery of some other categories of fees and expenses. Of particular interest was the government's position on fees associated with the taxpayer's district court case: in the government's view, it was not responsible for any fees associated with the judicial proceeding. *Carricker*, slip op. at *4-*5.

The government's argument rested upon a Ninth Circuit opinion, *Huffman v. Commissioner*, 978 F.2d 1139 (9th Cir. 1992). *Huffman* held that a concession in the answer demonstrated that the government's position in the judicial proceeding was substantially justified. 978 F.2d at 1148. The district court noted, however, that the Fifth Circuit had criticized this approach and had ruled that Section 7430 of the Code permits "tax litigants to recover the costs of a civil proceeding they never should have been required to litigate." *Carricker*, slip op. at *5 (quoting *Hanson v. Comm'r*, 975 F.2d 1150, 1156 (5th Cir. 1992)). Instead, the court concluded that the government's concession was just one factor that could be considered in the overall assessment of whether there was substantial justification for the government's litigation posture. *Id.*

This seems to be the better approach to the issue: as the Fifth Circuit noted in *Hanson*, making a concession conclusive leaves open the possibility that a taxpayer will be forced to fight with the government over a bogus theory, only to be denied an award of attorneys' fees because it subsequently conceded the merits. *Hanson*, 975 F.2d at 1156.

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