



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

DISTRICT COUNSEL

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: Requirements for Requesting Reasonable Administrative
Costs

This Field Service Advice responds to your memorandum dated November 9, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Taxpayer	=
Senator	=
C	=
D	=
E	=
F	=
G	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=

Date 9 =
 Date 10 =
 Date 11 =
 Date 12 =
 Date 13 =
 \$Z =

ISSUE(S):

1. Whether a letter to Taxpayer from the Chief, Special Procedures Function, accepting her arguments, constitutes a final determination of tax liability for purposes of I.R.C. § 7430(b)(4).
2. Whether Taxpayer's letter dated Date 1, to Senator and Senator's letter of Date 2, to the Service may be treated as an application for attorney's fees under I.R.C. § 7430(b)(4).

CONCLUSIONS:

Taxpayer's letter to Senator and Senator's subsequent letter to the Service do not meet the requirements for a claim for attorney's fees. Additionally, the record does not indicate that the Service mailed or otherwise furnished to Taxpayer a notice of abatement of the penalties, which would constitute a final decision by the Service regarding Taxpayer's liability for the trust fund recovery penalties. Thus, the 90-day period prescribed by Treas. Reg. § 301.7430-2 for requesting attorney's fees has not yet run. Therefore, Taxpayer still may submit a request for administrative costs under the procedures prescribed in Treas. Reg. § 301.7430-2(c).

FACTS:

During Date 13, Taxpayer was employed as C of D, d.b.a. E. In Date 3, the Service determined that trust fund recovery penalties under I.R.C. § 6672 should be assessed against Taxpayer as a "responsible person" who willfully failed to ensure that D made required withholding deposits relating to calendar quarters ending Date 4, and Date 5. On Date 6, Taxpayer filed a written protest with the revenue officer handling the proposed assessments. The case eventually was referred to the Service's F Appeals office, which upheld the proposed assessments on or about Date 7.

On Date 8, the Service assessed the trust fund recovery penalties against Taxpayer. On the same date, Taxpayer contested this assessment by filing Form

843, Claim for Refund, with the Service's G Service Center. The Service held Taxpayer's claim in abeyance and never acted upon it.

On Date 9, Taxpayer filed with the Service an Offer in Compromise (OIC) based upon doubt as to liability for the penalties assessed. Taxpayer submitted no additional information to support the OIC and made the same arguments as those in the earlier protest. On or about Date 10, the F Appeals office decided to reject Taxpayer's OIC and, on Date 11, issued Taxpayer a letter rejecting the offer.

Taxpayer subsequently contacted the office of Senator, which, in turn, contacted the Service regarding Taxpayer's case. The Service reviewed the inquiry, and on Date 12, the Chief, Special Procedures Function, issued a letter accepting Taxpayer's arguments. On Date 1, Taxpayer sent to Senator another letter requesting, among other things, reimbursement of attorney's fees in the amount of \$Z. On Date 2, Senator sent a letter requesting the Service's opinion as to whether Taxpayer may recover attorney's fees. There is no indication that the Service issued Taxpayer any formal notice of abatement of the penalties.

LAW AND ANALYSIS

Issue 1: Whether the 90-day period for requesting costs from the Internal Revenue Service under Treas. Reg. § 301.7430-2(c)(5) has expired.

If certain statutory requirements are met, a taxpayer who is the prevailing party in an administrative or court proceeding regarding the determination, collection, or refund of any tax, interest, or penalty under the Internal Revenue Code in which the position of the United States is not substantially justified may recover reasonable administrative and litigation costs. I.R.C. § 7430.

To recover attorney's fees from the Service in an administrative proceeding, a taxpayer must file a written request with the Service in accordance with the provisions of Treas. Reg. § 301.7430-2. The regulation expressly provides that in order to recover reasonable administrative costs, a taxpayer must file a request "no later than 90 days after the date the **final decision** of the Internal Revenue Service is mailed, or otherwise furnished, to the taxpayer." Treas. Reg. § 301.7430-2(c)(5). [Emphasis added.] (This rule was incorporated into the statute for costs incurred after August 5, 1997. I.R.C. § 7430(b)(4).) The regulation defines "final decision" as follows:

The final decision of the Internal Revenue Service for purposes of this section is the document which resolves the tax liability of the taxpayer with regard to all tax, additions to tax and penalties at issue in the administrative proceeding (**such as a Form 870 or closing agreement**), or a notice of assessment for that liability (such as the

notice and demand under section 6303), whichever is earlier mailed, or otherwise furnished, to the taxpayer.

Id. [Emphasis added.]

In the instant case, the letter issued to Taxpayer on Date 12, is evidence of the Service's intention to abate the penalties. It is not a binding agreement and does not finally resolve Taxpayer's liability to the degree of a Form 870, closing agreement, or actual assessment. Thus, the letter, in and of itself, was not sufficient to trigger the running of the 90-day period for requesting attorney's fees as administrative costs. Further, the record does not indicate that the Service issued to Taxpayer a notice of the abatement. Therefore, the limitation period for requesting administrative costs has not begun to run, and Taxpayer is not barred from requesting attorney's fees in this case.

Issue 2: Whether Taxpayer's letter dated Date 1, to Senator and Senator's letter of Date 2, to the Service may be treated as an application for attorney's fees under I.R.C. § 7430(b)(4).

The regulation expressly provides that a taxpayer must file a request for administrative costs with the Internal Revenue Service personnel having jurisdiction over the tax matter underlying the claim for costs, or, if those persons are unknown to the taxpayer, to the District Director for the district that considered the underlying matter. Treas. Reg. § 301.7430-2(c)(2).

In this case, Taxpayer wrote to Senator's office, not the Service, to request attorney's fees. In addition, Taxpayer's request did not provide several of the statements and affidavits required by the regulation, to wit:

1. A statement that the underlying issues or the issue of reasonable costs are not, and have not been, before any court of the United States. Treas. Reg. § 301.7430-2(c)(3)(i)(A).
2. A clear, concise statement of the reasons why Taxpayer alleges that the position of the United States in this matter was not substantially justified. Treas. Reg. § 301.7430-2(c)(3)(i)(B).
3. A statement sufficient to demonstrate that Taxpayer substantially prevailed as to the amount in controversy or with respect to the most significant issue or set of issues in the proceeding. Treas. Reg. § 301.7432-2(c)(3)(i)(C).
4. A statement that Taxpayer has not unreasonably protracted the portion of the administrative proceeding for which taxpayer requests costs. Treas. Reg. § 301.7430-2(c)(3)(i)(D).

5. A statement with supporting affidavit, executed by Taxpayer, setting forth the nature and amount of each specific item of reasonable costs for which Taxpayer seeks recovery. Treas. Reg. §§ 301.7430-2(c)(2)(i)(E), 301.7430-2(c)(3)(ii)(B).
6. An affidavit, executed by Taxpayer, stating that Taxpayer meets the net worth limitation imposed by the Code and regulations. Treas. Reg. §§ 301.7430-5(f), 301.7430-2(c)(3)(ii)(A).

The record indicates that Taxpayer submitted only copies of checks written to Taxpayer's attorney, with no supporting bills or other documentation. Therefore, Taxpayer's letter does not comply with the express requirements of the regulation, and does not constitute a claim for administrative costs.

In light of the foregoing conclusions, Taxpayer still may file a request for attorney's fees in compliance with the statute and regulations.
Please call if you have any further questions.

By: _____
THOMAS D. MOFFITT
Senior Technician Reviewer
Income Tax & Accounting Branch

cc: