Tax Controversy Corner

Recovering Attorney's Fees and Litigation Costs

By Megan L. Brackney

Code Sec. 7430 permits an award of reasonable litigation and administrative costs incurred by the "prevailing party" in an administrative or court proceeding brought by or against the United States in connection with the determination, collection or refund of any tax, interest or penalty under the Code.[1] Although most of the Code Sec. 7430 requirements apply similarly to all taxpayers, there are some issues that are more complicated for TEFRA partnerships,[2] such as determining the net worth limitations and identifying the party that actually incurred the litigation or administrative costs. This column discusses the general requirements and procedures for obtaining an award under Code Sec. 7430, some special considerations for TEFRA partnerships and other remedies that may be available against the government.

In general, to qualify for an award, a taxpayer must establish that (i) the taxpayer meets certain net worth requirements; (ii) the taxpayer substantially prevailed in the matter; (iii) the position of the United States was not substantially justified; (iv) all available administrative remedies were exhausted; (v) the taxpayer did not unnecessarily protract the proceeding; and (vi) the litigation costs were reasonable. Even if each element is satisfied, an award of fees is within the discretion of the trial court.[3]

Net Worth Requirements

To be eligible for fees under Code Sec. 7430, the taxpayer must first satisfy the net worth requirements of the Equal Access to Justice Act ("EAJA")[4]: (i) the net worth of an individual taxpayer, estate or trust cannot exceed $2 million; (ii) the net worth of an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization cannot exceed $7 million, and the entity cannot have more than 500 employees; or (iii) the taxpayer is a Code Sec. 501(c)(3) organization or a cooperative association, regardless of its net worth.

The general date for testing net worth under Code Sec. 7430 is the "administrative proceeding date,"[5] which is defined as the earlier of the date of the receipt by the taxpayer of the notice of the decision by the IRS Office of Appeals or the date of the notice of deficiency.[6] For these purposes, "notice of deficiency" includes the Notice of Final Partnership Administrative Adjustment ("FPAA") issued pursuant to Code Sec. 6223(a)(2).[7]

MEGAN L. BRACKNEY is a partner at Kostelanetz & Fink, LLP in New York, New York.

Neither Code Sec. 7430 nor the current regulations address how the net worth of a taxpayer should be determined.[8] The legislative history states that "'net worth' is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used."[9] Based on this history, numerous courts held that the acquisition cost of the taxpayer's assets, and not fair market value, should be used to determine net worth.[10]

In *Wilkes*,[11] the court considered the proper computation of the net worth of an estate under Code Sec. 7430. The government argued that although the cost of acquisition is the correct method for calculating net worth, it is the acquisition by the estate, and not the decedent, that must be considered. Because an estate is considered to have "acquired" the assets at fair market value as of the date of the decedent's death, the government contended that the Tax Court should determine net worth as the fair market value of the assets as of the date of death. In advocating for this position, the government argued that the use of the decedent's acquisition cost as a measure "would lead to the ludicrous situation in which the estate of Bill Gates would be eligible for an attorney's fee award based on his purchase of Microsoft stock for a few pennies a share."[12] The Tax Court pointed out, however, that in the case of an individual, the government would recognize the ability to recover attorney's fees if the taxpayer was a "stock-rich individual who sues while still alive."[13]

Neither Code Sec. 7430 nor the current regulations address how the net worth of a taxpayer should be determined.

The Tax Court also rejected the government's argument that to value the net worth of the estate based on the cost of acquisition, rather than fair market value, would be inconsistent with the method used for determining an estate's basis for tax purposes. The court agreed, but nonetheless ruled against the government, explaining that "taxation systems and provisions for shifting attorney's fees in litigation with the government serve different purposes. It is quite possible for Congress to determine one measure of worth is approximate in calculating the necessary tax contribution and another measure makes more sense where balancing incentives for 'challeng[ing] unreasonable IRS actions without being deterred by the cost of litigation.'"[14]

Despite the legislative history and the case law holding that the acquisition cost should be used to determine net worth, in regulations proposed in 2009, the Treasury nevertheless has taken the position that net worth should be determined using a fair market value standard on the ground that this standard provides a "more accurate assessment of a taxpayer's actual and current net worth as of the administrative proceeding date."[15] Although these regulations have not been finalized, the government has relied on them to argue for fair market value.

In *C.M. Corbalis*,[16] the government acknowledged that the "current state of the law" is to use acquisition cost, but nevertheless argued for a fair market value standard, citing the proposed regulations and *Powers*.[17] In *Powers*, the Tax Court had found that the taxpayer had negative net worth because the liabilities attributable to the taxpayer's office buildings exceeded their value due to the poor economy, noting that the value of the buildings was far less than what was shown on the balance sheet.[18] *Powers* seems to be an anomalous decision and has not been cited to support the use of a fair market value standard, other than by the government in *Corbalis*. In *Corbalis*, however, the Tax Court explained that it would not rely on *Powers* or the proposed regulations, but would continue to apply the cost of acquisition method of determining net worth.[19]

Putting aside the question of how to determine net worth of a taxpayer, the first step in determining whether a TEFRA partnership satisfies the net worth requirements is to identify the party whose net worth is to be determined. In *Foothill Ranch Company Partnership*,[20] the Tax Court considered this question. In that case, a Delaware corporation purchased a parcel of undeveloped land, which it later exchanged for an interest in Foothill Ranch Company Partnership ("FRC"), a TEFRA partnership. FRC and Orange County, California, executed an agreement that allowed FRC to develop the land. FRC then entered into separate agreements with two third parties to sell to them these parcels of the land. The agreements required FRC to complete its construction obligations to Orange County. By the end of FRC's 1988 tax year, FRC had not completed its construction obligations, and thus on its 1988 Form 1065, FRC used the percentage-of-completion method of accounting ("PCM") to calculate its income attributable to the transaction. The IRS issued an FPAA stating that FRC could not use PCM to calculate the income and that it thus had underreported its gross receipts.

FRC petitioned the Tax Court for a redetermination of its tax. At the time of the filing of the petition, FRC was a multi-tiered partnership owned by other passthrough entities and trusts. After the parties settled the case by filing a stipulation which made no adjustments to FRC's reported income, the tax matters partner[21] filed a motion for litigation costs. The Tax Court found that FRC satisfied all of the requirements of Code Sec. 7430, other than net worth.

The petitioner argued that the Tax Court should look to the partnership entity itself, *i.e.,* FRC, to determine whether the net worth requirements had been satisfied. The Tax Court rejected this approach on the theory that the partners, rather than the partnership entity, are the parties in a TEFRA proceeding.[22] The IRS argued that only the persons or entities whose tax abilities are affected by the outcome of the proceeding would be eligible to receive an award, and because two of the partners were passthrough entities, the partners of those entities must establish that they meet the net worth requirements. Essentially, the IRS argued that this "look-through" process must continue until it reaches an individual or entity whose tax liability was impacted.[23] The Tax Court rejected this approach on the ground that it contradicted the congressional determination that a partnership itself may be awarded litigation costs under EAJA.[24]

The Tax Court chose a third approach and held that first-tier partners that meet the net worth requirements are eligible to receive an award under Code Sec. 7430.[25] The Tax Court found that two of the first-tier partners of FRC satisfied the net worth requirements, and awarded litigation costs to them. Since no evidence had been submitted regarding the other first-tier partners, the Tax Court found that they had not established that they met the net worth requirements and thus were not eligible for an award.[26]

Several years after the decision in *Foothill Ranch*, in 2009, the Treasury issued proposed regulations stating that a TEFRA partnership meets the net worth limitations if, as of the administrative proceeding date, the *partnership's* net worth does not exceed $7 million (and it does not have more than 500 employees), *and each partner* requesting fees meets the appropriate net worth and size limitations.[27] For example, if a partnership has individual partners, the partnership's net worth cannot exceed $7 million (and it cannot have more than 500 employees), and each individual partner requesting fees must have a net worth that does not exceed $2 million.[28] If a partner seeking fees is a corporation, its net worth must not exceed $7 million and it must not have more than 500 employees.[29] These proposed regulations were never finalized, and until they are, presumably the Tax Court and other federal courts will apply the *Foothill Ranch* test and require only that the first-tier partners satisfy the net worth requirements.

"Incurred"

After the net worth requirements are satisfied, the next step in determining a fee award for a TEFRA partnership is identifying the party who actually "incurred" the litigation costs. Reasonable litigation and administrative costs can be awarded only if "incurred in connection with" the administrative proceeding with the IRS or litigation against the United States.[30] In *Republic Plaza Properties Partnership*,[31] the tax matters partner for Republic Plaza Properties Partnership ("the Partnership"), PFI Republic Limited, Inc. ("PFI"), filed a motion for litigation costs under Code Sec. 7430. The IRS had issued an FPAA to the Partnership, and after the petition was filed, the parties settled the adjustments and the IRS conceded that the Partnership had met the requirements of Code Sec. 7430, except for the identity of the prevailing party and whether it met the net worth requirements. The petition related to the Partnership's 1988 Form 1065. During the 1988 tax year, PFI acquired a 35-percent interest in the Partnership. In 1992, PFI sold its interest to a third party, which filed the Partnership's final Form 1065 and terminated the Partnership. PFI, however, retained all financial interest and/or tax liability with respect to the Partnership's 1988 and 1989 returns. The IRS issued the FPAA for 1988 in 1994, and PFI filed the Tax Court petition. At the time of the petition, PFI was a four-tiered partnership, and the first-tier partner, Pacific Harbor Capital Inc. ("Pacific Harbor"), paid all of the bills for legal and expert services in the case.

The Tax Court found that both PFI and the Partnership had a net worth of less than $7 million, but that PFI's first-tier partner, Pacific Harbor, as well as the second, third and fourth-tier partners, each had a net worth in excess of $7 million.[32] The apparent issue for the Tax Court was the identity of the prevailing party and whether *that* party had satisfied the net worth requirements. PFI argued that either the Partnership or PFI was the prevailing party and that both entities satisfied the net worth requirements. The IRS argued that the prevailing party was either Pacific Harbor or a lower-tiered partner that was the real party in interest and that neither entity satisfied the net worth requirements. The Tax Court did not decide this question, however, but instead denied the application for fees on the ground that neither the Partnership nor PFI had incurred any litigation costs. The Tax Court explained that even if the Partnership or PFI were prevailing parties, neither could recover fees because neither actually incurred any costs in connection with the Tax Court proceedings. Rather, Pacific Harbor paid all of the litigation costs at issue.

The Tax Court rejected the argument that Pacific Harbor incurred the costs for PFI in its capacity as tax matters partner. The Tax Court explained that "incurred," in this context, meant "to become liable or subject, to bring down upon oneself."[33] The Tax Court found that PFI had failed to establish that either the Partnership or PFI was legally obligated to pay any of the litigation costs at issue and noted further that the Partnership was no longer even in existence on the date the Tax Court petition was filed,[34] and thus found that no litigation costs could be awarded under Code Sec. 7430. The Tax Court did not discuss whether Pacific Harbor, who paid the fees, and thus presumably incurred them, was the prevailing party. This analysis was not necessary to the decision, as Pacific Harbor did not meet the net worth requirements in any event. If Pacific Harbor had met the net worth requirements, however, it would appear that under *Foothill Ranch*, as the first-tier partner, Pacific Harbor would have been eligible to recover litigation costs.

"Prevailing Party"

In addition to meeting the net worth requirements discussed above, the taxpayer must have substantially prevailed as to either the amount in controversy or "the most significant issue or set of issues presented."[35] Once a taxpayer establishes that it substantially prevailed over the IRS in a tax dispute, the burden of proof shifts to the IRS to establish that it was substantially justified in maintaining its position against the taxpayer.[36] The position of the government includes its litigation position in court, as well as the position taken by the IRS at the administrative level if that position was upheld by the Appeals Office or included in a notice of deficiency, even if that position was subsequently abandoned by District Counsel once the case was docketed in Tax Court.[37] However, the IRS's position in a "30-day letter" (notice of proposed adjustments) will not be considered a "position of the United States" if it is withdrawn during the Appeals process.[38] Accordingly, if the IRS concedes at Appeals so that the Appeals Office does not issue an adverse decision, the taxpayer will not be eligible for a fee award under Code Sec. 7430 for costs incurred prior to the IRS's concession.[39]

The government's position is substantially justified if it has a reasonable basis both in law and fact, a determination which is made on a case-by-case basis.[40] In determining whether the government was substantially justified, Code Sec. 7430(c)(4)(B)(iii) directs the court to consider whether the government lost in courts of appeal in other circuits on substantially similar issues. In addition, there is a rebuttable presumption that the IRS's position was not substantially justified if it did not follow the IRS's own published guidance in the proceeding (or private letter rulings, technical advice and determination letters issued to the taxpayer).[41] The concession of an issue, does not, by itself, establish that its position was unreasonable; it is merely a factor to be considered by the court.[42] Courts will also consider factors such as whether the government used the costs and expenses of litigation to extract concessions from the taxpayer and whether the government pursued litigation against the taxpayer for purposes of harassment or embarrassment or out of political motivation.[43]

Courts have found the government's position to be unjustified when the government advocated an unreasonable interpretation of the relevant statutes,[44] ignored case law or Treasury regulations supporting the taxpayer's position,[45] repeatedly changed its position during the course of the litigation,[46] treated one taxpayer more harshly than similarly situated taxpayers,[47] violated a settlement agreement entered into in a prior case,[48] issued a notice of deficiency for a year which was clearly barred by the statute of limitations,[49] asserted penalties with no factual basis,[50] failed to consider information in its possession,[51] relied on an obviously biased and incredible witness,[52] and attempted to create a conflict among circuits despite repeated losses.[53] The fact that the government's position may have been reasonable at the outset of a case does not justify adhering to that position if there are developments in the law or new evidence that makes that position untenable.[54] In that situation, fees will be awarded to the taxpayer for litigation which took place after the date the government should have conceded the case.[55]

Qualified Offers

Alternatively, a taxpayer who meets the net worth requirements will be treated as a prevailing party if (i) the taxpayer made a "qualified offer" to the IRS, (ii) the IRS rejected the qualified offer, and (iii) the IRS later obtains a court judgment that is less than the dollar amount of the qualified offer.[56] A qualified offer is an offer made in writing by the taxpayer to the IRS specifying the amount of the taxpayer's tax liability and which is designated as an offer under Code Sec. 7430.[57] The qualified offer must be made during the period beginning on the date on which the taxpayer is first notified of the opportunity for administrative review before Appeals and ending on the date which is 30 days before the case is set for trial.[58] The qualified offer rule does not apply where the judgment was pursuant to a settlement with the government.[59]

Exhaustion of Administrative Remedies

Before attorney's fees will be awarded, the taxpayer must exhaust all available administrative remedies.[60] Treasury regulations require that before litigating liability in Tax Court or filing a refund suit, the taxpayer must file a protest and request and attend an Appeals Office conference.[61] These procedures are not required in a Tax Court case if the IRS informs the taxpayer that they are not necessary or if the taxpayer does not receive a 30-day letter and therefore is unable to file a protest or request an Appeals conference, or the taxpayer was not offered an appeals conference after the case was docketed in Tax Court.[62] A taxpayer bringing a refund suit is considered to have exhausted administrative remedies if he or she exhausted those remedies prior to receiving the 90-day letter, or if, after filing the claim for refund, he or she received a notice of disallowance of the claim (without first receiving a preliminary notice of proposed disallowance inviting him or her to request an Appeals conference), or if the IRS took no action on the refund claim for six months.[63]

Reasonable Litigation Costs

Reasonable litigation costs include costs incurred on or after the earlier of (i) the date the taxpayer receives the notice of the decision of the Appeals Office; (ii) the date of the notice of deficiency; or (iii) the date on which the first letter of proposed deficiency, which allows the taxpayer an opportunity for administrative review in the Appeals Office.[64] Costs may be awarded for administrative fees or similar charges imposed by the IRS, court costs, expert witness fees, costs of analyses and studies "necessary for the preparation of the party's case" and attorney's fees.[65] Court costs include "normal litigation expenses" such as postage, travel expenses and computerized research.[66]

Except for expert witness and attorney's fees, the amounts awarded are to be "based upon prevailing market rates."[67] Expert witness fees are limited to the highest rate paid by the U.S. government for expert witnesses.[68] Currently, attorney's fees are limited to a maximum of $190 per hour,[69] unless the court finds that a higher rate is necessary because of an increase in the cost of living or because of a "special factor," such as the limited availability of qualified attorneys.[70] Several courts have found that a "special factor" permitted an upward adjustment in complex cases that required the services of an attorney who specialized in tax cases,[71] but other courts have rejected this view on the ground that virtually all cases to which Code Sec. 7430 applies will be handled by attorneys with "tax expertise."[72]

Procedures for Obtaining Awards

An award under Code Sec. 7430 may be made by any federal court, including the Tax Court, Claims Court and appellate courts,[73] except a bankruptcy court.[74] Code Sec. 7430 also permits an award of attorney's fees in any declaratory judgment proceeding if the requirements for obtaining such fees in other tax proceedings are satisfied.[75] The determination of who is the prevailing party is to be made by the court if the matter was litigated, by agreement of the parties or by the IRS if only an administrative proceeding was involved.[76] When the IRS makes the decision in an administrative proceeding, the taxpayer may appeal its decision to the Tax Court.[77]

A taxpayer seeking an award under Code Sec. 7430 must submit to the court an application for fees and other expenses that shows that the party meets all of the eligibility requirements and includes an itemized statement of the expenses.[78] This application must be made within 30 days of a final judgment.[79]

Treasury regulations require that before litigating liability in Tax Court or filing a refund suit, the taxpayer must file a protest and request and attend an Appeals Office conference.

In addition to the statutory requirements, the Tax Court has established rules governing applications under Code Sec. 7430. Pursuant to Tax Court Rule 231, if the case is settled, the question of costs and fees may be resolved by stipulation of the parties or by a motion made after all other issues have been settled.[80] If the case is not settled, a party may submit a motion for costs or fees within 30 days after the case is decided.[81] If the taxpayer does not comply with Rule 231 and file the application within 30 days, he or she will be barred by *res judicata* from filing a subsequent proceeding for costs or fees because the stipulation decision documents contain the resolution of all issues that were litigated or could have been litigated in the Tax Court case.[82]

If the motion is timely filed, the Tax Court will either decide it immediately or direct the other party to respond within 60 days.[83] In such a case, the parties must confer prior to the filing of the response in an effort to settle the issue.[84] The Tax Court may order a hearing on the motion where there is a *bona fide* factual dispute.[85] The burden of proof is on the party seeking costs or fees.[86]

An order awarding or denying costs or fees is incorporated as part of the final judgment in the case and is appealable in the same manner as that judgment.[87] The taxpayer may be entitled to an award of fees for the time spent litigating the fee award itself, even if the government's position on the fee issue was not unreasonable.[88]

[U]nder Code Sec. 6673, courts can award fees if a party—either the taxpayer or the government—litigates in bad faith or raises frivolous arguments.

Other Remedies?

Taxpayers who do not meet the net worth requirements often complain that they are not eligible to receive an award of fees under Code Sec. 7430. There are, however, two other remedies available to recover costs and fees on behalf of the taxpayer in tax litigation that have no net worth requirements.

First, under Code Sec. 6673, courts can award fees if a party—either the taxpayer or the government—litigates in bad faith or raises frivolous arguments. Code Sec. 6673 was "designed to deter taxpayers from bringing frivolous or dilatory suits."[89] However, courts occasionally have applied it against the government in rare cases in which the government has asserted a flagrantly frivolous position.[90]

In addition, although rarely used, it should be noted that in refund suits or other cases litigated in the federal district courts, Rule 11 of the Federal Rules of Civil Procedure authorizes an award of attorney's fees or other sanctions against a party or attorney for submitting a baseless pleading or motion. Although Rule 11 is rarely invoked against the government, when applicable, it will justify a fee award even if the net worth and other requirements of Code Sec. 7430 are not met.[91]

ENDNOTE

1 Administrative proceedings do not include matters of general application, including hearings on regulations, comments on forms, or proceedings involving revenue rulings or revenue procedures; proceedings involving requests for private letter rulings or similar determinations; proceedings involving technical advice memoranda; and proceedings in connection with collection actions, including proceedings under Code Sec. 7432 (civil damages for failure to release lien) or Code Sec. 7433 (civil damages for certain unauthorized collection actions), except proceedings under Code Sec. 7433(e) (actions for violations of certain bankruptcy proceedings). Reg. §301.7430-3(a)(1)-(4) & (b).

2 Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Code Secs. 6221, *et. seq.*

3 *J.C. Zinniel*, CA-7, 89-2 USTC ¶9541, 883 F2d 1350, 1355, (Code Sec. 7430 "authorizes, rather than commands, the court to award reasonable litigation costs.").

4 28 USC §2412(d)(2)(B); Code Sec. 7430(c)(4)(D).

5 Reg. §301.7430-5(f)(1) & (2). An estate's net worth is assessed at the time of death, and a trust's net worth is assessed as of the end of the tax year of the controversy. Code Sec. 7430(c)(4)(D).

6 Reg. §301.7430-2(c)(2)(i) & Reg. §301.7430-2(c)(2)(ii).

7 Reg. §301.7430-2(c)(3).

8 *See* Reg. §301.7430-5(f). Absent a challenge from the government, an affidavit from a party indicating that he or she satisfies the net worth requirement is usually sufficient. *N.R. Wilkes*, DC-FL, 2000-2 USTC ¶60,385 (noting that EAJA "does not establish strict standards for proving net worth and decision law has recognized some informality of proof is appropriate in this context") (internal quotations and citations omitted), *aff'd without deciding issue, N.R. Wilkes*, CA-11, 2002-1 USTC ¶60,438, 289 F3d 684.

9 H.R. REP. No. 1418, 96th Cong. 2d Sess. 15, 1980 U.S.C.C.A.N. 4984, 4994.

10 *Wilkes*, 2000-2 USTC ¶60,385; *Estate of Lute v. United States*, DC-NE, 19 FSupp2d 1047 (1998); *J.H. Swanson*, 106 TC 76, 94–95, CCH Dec. 51,155 (1996); *see also American Pacific Concrete Pipe Company, Inc. v. NLRB*, CA-9, 788 F2d 586, 591 (1986); *Continental Web Press, Inc. v. NLRB*, CA-7, 767 F2d 321, 323 (1985). Under GAAP, the acquisition cost is arrived at by subtracting accumulated depreciation from the original cost of an asset. *Swanson*, 106 TC at 96, 97, n.24.

11 *Wilkes*, 2000-2 USTC ¶60,385.

12 *Id.*

13 *Id.*

14 *Id.* (quoting *T. Cooper*, CA-11, 95-2 USTC ¶50,434, 60 F3d 1529 (1995)).

15 Proposed Reg. §301.7430-5(g)(1), 74 FR 61589-01 (Nov. 25, 2009) (Background and Explanation of Provisions).

16 *C.M. Corbalis*, CCH Dec. 59,814, 142 TC No. 2 (2014) (citing *Swanson*, 106 TC at 94–97).

17 *M.L. Powers*, 100 TC 457, 483–84, CCH Dec. 49,059 (1993), *aff'd in part, rev'd in part*, CA-5, 95-1 USTC ¶50,086, 43 F3d 172.

18 *Id.*

19 *Corbalis*, 142 TC at *9. In a decision issued after *Powers*, however, the government conceded that a taxpayer's net worth is calculated based on historical acquisition costs. *G.D. Willford*, 67 TCM 2542, CCH Dec. 49,753(M), TC Memo. 1994-135, at *13.

20 *Foothill Ranch Company Partnership*, 110 TC 94, CCH Dec. 52,555 (1998).

21 Code Sec. 6321(a)(7)(A); Reg. §301.6231(a)(7)-1(b)(1)(ii).

22 *Foothill Ranch Company Partnership*, 110 TC at *99; Code Secs. 6226(c), 6228(a)(4); Tax Court Rule 247; *Chef's Choice Produce, Ltd.*, 95 TC 388, 395, CCH Dec. 46,910 (1990).

23 *Id.*

24 *Id.* (*citing* 28 USC §2412(d)(2)(B)).

25 *Id.* at *100.

26 *Id.* The Tax Court also noted "that the presence of ineligible partners does not preclude the eligible partners ... from receiving an award."

27 Proposed Reg. §301.7430-5(g)(5).

28 Proposed Reg. §301.7430-5(g)(5)(B)(ii).

29 *Id.*

30 Code Sec. 7430(a)(1) & (2).

31 *Republic Plaza Properties Partnership*, 73 TCM 2836, CCH Dec. 52,058(M), TC Memo. 1997-239.

32 The Tax Court tested PFI's net worth at the time of the filing of the Petition, and the Partnership's net worth at the time of its termination. *Id.* at *1. Although it was not material to the outcome of the case, neither date is the correct date for testing a taxpayer's net worth. Rather, it is the "administrative proceeding date," *i.e.,* the date of the FPAA, which is the appropriate date. *See* Reg. §301.7430-2(c)(2).

33 *Republic Plaza Properties Partnership*, 73 TCM 2836, CCH Dec. 52,058(M), TC Memo. 1997-239 at *3 (*quoting E.R. Frisch*, 87 TC 838, 846, CCH Dec. 43,459 (1986)).

34 *Id.* at *3, n. 5.

35 Code Sec. 7430(c)(4)(A)(i)(II).

36 Code Sec. 7430(c)(4)(B)(i).

37 Reg. §301.7430-5(b); *Pacific Fisheries, Inc.*, CA-9, 2007-1 USTC ¶50,464, 484 F3d 1103 (government's position in administrative proceedings and judicial proceedings are considered separately).

38 *J. Puricello*, 107 TCM 1255, CCH Dec. 59,858(M), TC Memo 2014-50.

39 *Id.*

40 *Moulton v. United States*, CA-1, 429 F3d 352, 355 (2005); *J.E. Bisbee*, CA-8, 2001-1 USTC ¶50,359, 245 F3d 1001, 1007; *Consolidated Investors Group*, 100 TCM 51, CCH Dec. 58,277(M), TC Memo 2010-158.

41 Code Secs. 7430(c)(4)(B)(ii), (iv).

42 *Blakely v. United States*, 85 FedCl 360, 372 (2008); *Consolidated Investors Group,* 100 TCM 51, CCH Dec. 58,277(M), TC Memo 2010-158.

43 *See e.g., KM Systems, Inc. v. United States,* DC-NJ, 360 FSupp. 2d 641, 644 (2005).

44 *P.R. Newham*, CA-9, 87-1 USTC ¶9255, 813 F2d 1384, 1387 (taxpayer awarded attorney's fees where IRS's position contradicted "express statutory language").

45 *P. Plowman*, DC Okla., 87-1 USTC ¶9155, 659 FSupp 34, 36–38 (two prior lawsuits in same district had upheld similar tax shelters, attorney's fees awarded against government for contesting third case at trial).

46 *A.Y. Beaty*, CA-6, 91-2 USTC ¶60,077 , 937 F2d 288, 293 ("the IRS' constantly shifting positions reveal a 'litigate now, think later' mentality").

47 *C.E. Hubbard*, 89 TC 792, 803, CCH Dec. 44,270 (1987) (position by IRS which contradicts position it took on same issue in other cases is "unreasonable").

48 *G.R. Layton*, DC-VA, 86-2 USTC ¶9786, 650 FSupp 334, 336.

49 *B. Hanson*, CA-5, 92-2 USTC ¶50,554, 975 F2d 1150; *I. Cassuto*, 93 TC at 262-5, CCH Dec. 45,968 (1989), *aff'd in part, rev'd in part on other grounds*, CA-2, 91-2 USTC ¶50,334, 936 F2d 736.

50 *C.B. Owens*, 84 TCM 419, CCH Dec. 54,898(M), TC Memo. 2002-253 (IRS position not substantially justified where IRS aware of conflicting evidence on penalty issue).

51 *J.J. Petito*, 84 TCM 488, CCH Dec. 54,920(M), TC Memo. 2002-271 (IRS incorrectly treated taxpayer's company as subchapter S corporation when documents in IRS's possession clearly showed that it was a subchapter C corporation).

52 *L. Snider*, CA-8, 2007-1 USTC ¶50,173, 468 F3d 500 (IRS not substantially justified when it persisted in claiming that Revenue Agent had not improperly disclosed confidential information after IRS Counsel had deposed several witnesses who testified about the disclosures).

53 *F.M. Perry, Sr. Est.*, CA-5, 91-1 USTC ¶50,283, 931 F2d 1044 ("The Commissioner is certainly free to pursue his historic policy of litigating and re-litigating the same issue from circuit to circuit. But when he does so time and again in cases, such as this, wherein the Commissioner elects to ignore the clear wording of … the Code, he does so at the risk of incurring the obligation to reimburse such taxpayers for attorney's fees pursuant to the provisions of Code Sec. 7430.").

54 *D.J. Grisanti*, DC Miss., 2007-1 USTC ¶50,303 (determination of reasonableness of government's position is not a "static one"; a position that was reasonable at the outset may become unreasonable as circumstances change).

55 *K.E. Stieha, Jr.*, 89 TC 784, 790-91, CCH Dec. 44,269 (1987).

56 Code Sec. 7430(c)(4)(E); Reg. §301.7430-7(a).

57 Code Sec. 7430(g)(1); Reg. §301.7430-7(c)(4).

58 Code Sec. 7430(g)(2); Reg. §301.7430-7; Procedures for Evaluating and Responding to Qualified Offers Submitted Under Code Sec. 7430(g), IRS CCN CC-2010-007 (Apr. 2, 2010).

59 Code Sec. 7430(c)(4)(E)(ii)(I).

60 Code Sec. 7430(b)(1); Reg. §301.7430-1(a).

61 Reg. §301.7430-1(b)(1). A taxpayer does not have to agree to an extension of time for assessment of tax to be considered to have exhausted all available administrative remedies. Reg. §301.7430-1(b)(4).

62 Reg. §301.7430-1(f)(2)(i).

63 Reg. §301.7430-1(f)(3), (4).

64 Code Sec. 7430(c)(2).

65 Code Sec. 7430(a), Code Sec. 7430(c)(1)–(3); Reg. §301.7430-4(a) & (b)(1). "Attorneys" also includes law clerks, paralegals and legal assistants. *Miller v. Alamo*, CA-8, 96-1 USTC ¶50,003.

66 *Moulton*, 429 F3d at 355; *J.M. Dunaway*, 124 TC 80, 90, CCH Dec. 55,953 (2005).

67 Code Sec. 7430(c)(1)(B).

68 Code Sec. 7430(c)(1)(B)(i); Reg. §301.7430-4(b)(ii).

69 Rev. Proc. 2013-35, 2013-47 IRB 537 (Nov. 18, 2013). Since 1996, the \$125-per-hour amount stated in Code Sec. 7430(c) has been subject to an annual cost of living adjustment, rounded to the nearest multiple of \$10.

70 Code Sec. 7430(c)(1)(B)(iii); Reg. §301.7430-4(b)(2).

71 *J.W. Bode*, CA-5, 91-1 USTC ¶50,013, 919 F2d 1044, 1049–51 (specialist in tax litigation awarded enhanced fee where court found that taxpayers could not have obtained qualified attorneys to handle complex litigation for statutory rate); *In re D.L. Seay*, BC-DC Ark., 2007-2 USTC ¶50,694, 369 BR 423 (awarding attorney's fees above statutory rate in complex litigation where attorneys had expertise in partnership tax issues and where there were limited other similarly qualified attorneys in geographic area).

72 *I. Cassuto*, CA-2, 91-2 USTC ¶50,334, 936 F2d 736 at 743 (specialized market for tax lawyer usually not relevant because all attorneys handling tax cases presumably have degree of expertise); *United States v. Guess*, DC-CA, 425 FSupp2d 1143 (2006) (attorney's tax expertise presumed in proceeding involving the Code, and thus it is not a "special factor" for purposes of deviating from the maximum rate cap.).

73 Code. Sec. 7430(c)(6); *D.E. Heasley*, CA-5, 92-2 USTC ¶50,412, 967 F2d 116.

74 In a tax case pending before bankruptcy court, that bankruptcy court may decide the question of attorney's fees if the IRS explicitly consents, but otherwise, the bankruptcy court must make a recommendation to the district court, which will enter the award of attorney's fees. *In re M. Yochum*, CA-9, 96-2 USTC ¶50,390, 89 F3d 661; *In re H.R. Grewe*, CA-4, 93-2 USTC ¶50,535, 4 F3d 299, 303 (same); *In re Seay*, *D.L. Seay*, BC-DC Ark., 2007-2 USTC ¶50,694, 369 BR 423, at 435–36 (same).

75 Code Sec. 7430(b)(3)(A).

76 Code Sec. 7430(c)(4)(C).

77 Code Sec. 7430(f)(2); *see* Tax Court Rules 270–274.

78 28 USC §2412(d)(1)(B).

79 *Id.*

80 Tax Court Rule 231(a)(2). A request for costs and fees is not to be included in a petition to the Tax Court. Tax Court Rule 34(b)(8).

81 Tax Court Rule 231(a)(2). The contents of the motion are described in Tax

Court Rules 231(b) through (e). For a partnership requesting fees, the "party" includes the partner who filed the petition, the tax matters partner and each person who satisfies the requirements of Code Secs. 6226(c), 6226(d) or 6228(a)(4).

[82] *R.F. Gustafson*, 97 TC 85, 93, CCH Dec. 47,492 (1998); *W.D. Foote*, 106 TCM 642, CCH Dec. 59,711(M), TC Memo 2013-276.

[83] Tax Court Rule 232(a), (b). The requirements of the response are described in Tax Court Rule 232(b).

[84] Tax Court Rule 232(c).

[85] Tax Court Rule 232(a)(2).

[86] Tax Court Rule 232(e).

[87] Code Sec. 7430(f)(1); Tax Court Rule 232(f).

[88] *Jean v. United States*, CA-1, 396 F3d 449, 453 (2005); *Terrell Equipment Co.*, CA-5, 2003-2 USTC ¶50,625, 343 F3d 478, 481.

[89] *P. Sauers*, CA-3, 85-2 USTC ¶9608, 771 F2d 64.

[90] *See, e.g.*, *J.R. Dixon*, 132 TC 55, CCH Dec. 57,766 (2009) (awarding fees under Code Sec. 6673(a)(2)(B) due to the "government attorney's unreasonable and vexatious misconduct."); *R. Hongsermeier*, 98 TCM 500, CCH Dec. 58,005(M), TC Memo 2009-273 (same).

[91] *D. Mattingly*, CA-9, 91-2 USTC ¶50,377, 939 F2d 816.