

Internal Revenue Service, Treasury

§ 301.7430-1

(2) Representative and specially qualified representative.

- (i) Representative.
 - (ii) Specially qualified representative.
- (3) Limitation on fees for a representative.
- (i) In general.
 - (ii) Cost of living adjustment.
 - (iii) Special factor adjustment.
- (c) Certain costs excluded.

(1) Costs not incurred in an administrative proceeding.

(2) Costs incurred in an administrative proceeding but not reasonable.

- (i) In general.
- (ii) Special rule for expert witness' fees on issue of prevailing market rates.

(3) Litigation costs.

(4) Examples.

§ 301.7430-5 *Prevailing party.*

(a) In general.

(b) Position of the Internal Revenue Service.

(c) Substantially justified.

(1) In general.

(2) Exception.

(3) Presumption.

(4) Amount in controversy.

(e) Most significant issue or set of issues presented.

(f) Net worth and size limitations.

(1) Individuals and estates.

(2) Others.

(3) Special rule for charitable organizations and certain cooperatives.

(g) Determination of prevailing party.

(h) Examples.

§ 301.7430-6 *Effective date.*

[T.D. 8542, 59 FR 29360, June 7, 1994, as amended by T.D. 8725, 62 FR 39118, July 22, 1997]

§ 301.7430-1 **Exhaustion of administrative remedies.**

(a) *In general.* Section 7430(b)(1) provides that a court shall not award reasonable litigation costs in any civil tax proceeding under section 7430(a) unless the court determines that the prevailing party has exhausted the administrative remedies available to the party within the Internal Revenue Service. This section sets forth the circumstances in which such administrative remedies shall be deemed to have been exhausted.

(b) *Requirements—(1) In general.* A party has not exhausted the administrative remedies available within the Internal Revenue Service with respect to any tax matter for which an Appeals office conference is available under

§§ 601.105 and 601.106 of this chapter (other than a tax matter described in paragraph (c) of this section) unless—

(i) The party, prior to filing a petition in the Tax Court or a civil action for refund in a court of the United States (including the Court of Federal Claims), participates, either in person or through a qualified representative described in § 601.502 of this chapter, in an Appeals office conference; or

(ii) If no Appeals office conference is granted, the party, prior to the issuance of a statutory notice in the case of a petition in the Tax Court or the issuance of a notice of disallowance in the case of a civil action for refund in a court of the United States (including the Court of Federal Claims)—

(A) Requests an Appeals office conference in accordance with §§ 601.105 and 601.106 of this chapter; and

(B) Files a written protest if a written protest is required to obtain an Appeals office conference.

(2) *Participates.* For purposes of this section, a party or qualified representative of the party described in § 601.502 of this chapter participates in an Appeals office conference if the party or qualified representative discloses to the Appeals office all relevant information regarding the party's tax matter to the extent such information and its relevance were known or should have been known to the party or qualified representative at the time of such conference.

(3) *Tax matter.* For purposes of this section, "tax matter" means a matter in connection with the determination, collection or refund of any tax, interest, penalty, addition to tax or additional amount under the Internal Revenue Code.

(4) *Failure to agree to extension of time for assessments.* Any failure by the prevailing party to agree to an extension of the time for the assessment of any tax will not be taken into account for purposes of determining whether the prevailing party has exhausted the administrative remedies available to the party within the Internal Revenue Service.

(c) *Revocation of a determination that an organization is described in section 501(c)(3).* A party has not exhausted the administrative remedies available

within the Internal Revenue Service with respect to a revocation of a determination that it is an organization described in section 501(c)(3) unless, prior to filing a declaratory judgment action under section 7428, the party has exhausted its administrative remedies in accordance with section 7428, and any regulations, rules, and revenue procedures thereunder.

(d) *Actions involving summonses, levies, liens, jeopardy and termination assessments, etc.* (1) A party has not exhausted the administrative remedies available within the Internal Revenue Service with respect to a matter other than one to which paragraph (b) or (c) of this section applies (including summonses, levies, liens, and jeopardy and termination assessments) unless, prior to filing an action in a court of the United States (including the Tax Court and the Court of Federal Claims)—

(i) The party submits to the district director of the district having jurisdiction over the dispute a written claim for relief reciting facts and circumstances sufficient to show the nature of the relief requested and that the party is entitled to such relief; and

(ii) The district director has denied the claim for relief in writing or failed to act on the claim within a reasonable period after such claim is received by the district director.

(2) For purposes of this paragraph (d)(2), a reasonable period is—

(i) The 5-day period preceding the filing of a petition to quash an administrative summons issued under section 7609;

(ii) The 5-day period preceding the filing of a wrongful levy action in which a demand for the return of property is made;

(iii) The period expressly provided for administrative review of the party's claim by an applicable provision of the Internal Revenue Code that expressly provides for the pursuit of administrative remedies (such as the 16-day period provided under section 7429(b)(1)(B) relating to review of jeopardy assessment procedures); or

(iv) The 60-day period following receipt of the claim for relief in all other cases.

(e) *Actions involving willful violations of the automatic stay under section 362 or*

the discharge provisions under section 524 of the Bankruptcy Code—(1) Section 7433 claims. A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code or the discharge provisions under section 524 of the Bankruptcy Code unless it files an administrative claim for damages or for relief from a violation of section 362 or 524 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay or discharge violation was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d) prior to filing a petition under section 7433.

(2) *Section 362(h) claims.* A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code unless it files an administrative claim for relief from a violation of section 362 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay violation was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d) prior to filing a petition under section 362(h) of the Bankruptcy Code.

(f) *Exception to requirement that party pursue administrative remedies.* If the conditions set forth in paragraph (f)(1), (f)(2), (f)(3), or (f)(4) of this section are satisfied, a party's administrative remedies within the Internal Revenue Service shall be deemed to have been exhausted for purposes of section 7430.

(1) The Internal Revenue Service notifies the party in writing that the pursuit of administrative remedies in accordance with paragraphs (b), (c), and (d) of this section is unnecessary.

(2) In the case of a petition in the Tax Court—

(i) The party did not receive a notice of proposed deficiency (30-day letter) prior to the issuance of the statutory notice and the failure to receive such notice was not due to actions of the

party (such as a failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); and

(ii) The party does not refuse to participate in an Appeals office conference while the case is in docketed status.

(3) In the case of a civil action for refund involving a tax matter other than a tax matter described in paragraph (e)(4) of this section, the party—

(i) Participates in an Appeals office conference with respect to the tax matter prior to issuance of a statutory notice of deficiency with respect to such tax matter; or

(ii) Did not receive written notification that an Appeals office conference was available prior to issuance of a notice of disallowance and the failure to receive such a notification was not due to the actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); or

(iii) Did not receive either written or oral notification that an Appeals office conference had been granted within six months from the date of the filing of the claim for refund and the failure to receive such notice was not due to actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter).

(4) In the case of a civil action for refund involving a tax matter under sections 6703 or 6694—

(i) The party did not receive a notice of proposed disallowance prior to issuance of a notice of disallowance and the failure to receive such notice was not due to actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); or

(ii) During the six-month period following the day on which the party's claim for refund is filed, the party's claim for refund is not denied, and the Internal Revenue Service has failed to process the claim with due diligence.

(g) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. Taxpayer A exchanges property held for investment for similar property and claims that the gain on the exchange is not recognized under section 1031. The Internal Revenue Service conducts a field examination and determines that there has not been a like-kind exchange. No agreement is reached on the matter and a notice of proposed deficiency (30-day letter) is sent to A. A does not file a request for an Appeals office conference. A pays the amount of the proposed deficiency and files a claim for refund. A notice of proposed disallowance is issued by the Internal Revenue Service. A does not request an Appeals office conference and, instead, files a civil action for refund in a United States District Court. A has not exhausted the administrative remedies available within the Internal Revenue Service.

Example 2. Assume the same facts as in *Example 1* except that, after receiving the notice of proposed deficiency (30-day letter), A files a request for an Appeals office conference. No agreement is reached at the conference. A pays the amount of the proposed deficiency and files a claim for refund. A notice of proposed disallowance is issued by the Internal Revenue Service. A does not request an Appeals office conference and files a civil action for refund in a United States District Court. A has exhausted the administrative remedies available within the Internal Revenue Service.

Example 3. Assume the same facts as in *Example 1* except A first requests an Appeals office conference after A's receipt of the notice of proposed disallowance. A is granted an Appeals office conference and A participates in such conference. A has exhausted the administrative remedies available within the Internal Revenue Service.

Example 4. Taxpayer B receives a notice of proposed deficiency (30-day letter) after completion of a field examination. B provided to the Internal Revenue Service during the examination all relevant information under the taxpayer's control and all relevant legal arguments supporting the taxpayer's position. B properly requests an Appeals office conference. The Appeals office, to obtain an additional period of time to consider the tax matter, requests that B sign Form 872 to extend the time for an assessment of tax, but B declines. Appeals then denies the request for a conference and issues a notice of deficiency. B has exhausted the administrative remedies available within the Internal Revenue Service.

Example 5. Taxpayer C receives a notice of proposed deficiency (30-day letter) and a written statement that C need not file a written protest or request an Appeals office conference since a conference will not be

granted. C files a petition in the Tax Court after receiving the statutory notice of deficiency. C's administrative remedies within the Internal Revenue Service are deemed to have been exhausted.

Example 6. On January 2, the Internal Revenue Service serves a summons issued under section 7609 on third-party recordkeeper D to produce records of taxpayer E. On January 5, notice of the summons is given to E. The last day on which E may file a petition in a court of the United States to quash the summons is January 25. Thereafter, E files a written claim for relief with the district director having jurisdiction over the matter together with a copy of the summons. The claim and copy are received by the district director on January 20. On January 25, E files a petition to quash the summons. E has exhausted the administrative remedies available within the Internal Revenue Service.

Example 7. A notice of Federal tax lien is filed in County M on March 3, in the name of F. On April 2, F pays the entire liability thereby satisfying the lien. On May 2, F files a written claim with the district director having jurisdiction over the tax matter demanding a certificate of release of lien. Thereafter, F provides the district director with a copy of the notice of Federal tax lien and a copy of the canceled check in satisfaction of the lien, which are received by the district director on May 15. F's claim is deemed to have been filed on May 15. Accordingly, F must wait until after July 14 (60 days following the filing of the claim for relief on May 15) to commence an action, in order to have exhausted the administrative remedies available within the Internal Revenue Service.

Example 8. A revenue officer seizes an automobile to effect collection of G's liability on January 10. On January 22, H submits a written claim to the district director having jurisdiction over the tax matter claiming that H purchased the automobile from G for an adequate consideration before the tax lien against G arose, and demands immediate return of the automobile. A copy of the title certificate and H's canceled check are submitted with the claim. The claim is received by the district director on January 25. On January 30, H brings a wrongful levy action. H has exhausted the administrative remedies available within the Internal Revenue Service.

Example 9. The Internal Revenue Service issues a revenue ruling which holds that ear piercing does not affect a function or structure of the body within the meaning of section 213 and therefore is not deductible. Taxpayer I deducts the costs of ear piercing and, following an examination, receives a notice of proposed deficiency (30-day letter) disallowing the treatment of such costs. Because of the revenue ruling, I believes a conference would not aid in the resolution of the

tax dispute. Accordingly, I does not request an Appeals office conference. After receiving a statutory notice of deficiency, I files a petition in the Tax Court. I has not exhausted the administrative remedies available within the Internal Revenue Service. The issuance of a revenue ruling covering the same fact situation but taking a contrary position does not constitute notification by the Internal Revenue Service to I that the pursuit of administrative remedies is unnecessary. Similarly, the issuance to I of a private letter ruling or technical advice does not constitute notification by the Internal Revenue Service that the pursuit of administrative remedies is unnecessary.

Example 10. Taxpayer J is assessed a penalty under section 6701 for aiding in the understatement of the tax liability of another person. J pays 15% of the penalty in accordance with section 6703 and files a claim for refund on June 15. J is not issued a notice of proposed disallowance and thus cannot participate in an Appeals office conference within six months of the filing of the claim for refund. J brings an action on December 23. J has exhausted the administrative remedies available within the Internal Revenue Service.

Example 11. Taxpayer K receives a notice of proposed deficiency (30-day letter) and neither requests nor participates in an Appeals office conference. The Service then issues a statutory notice of deficiency (90-day letter). Upon receiving the statutory notice, and after filing a petition with the Tax Court, K requests an Appeals office conference. K has not exhausted the administrative remedies available within the Internal Revenue Service because the request for an Appeals office conference was made after the issuance of the statutory notice.

(h) *Effective date.* This section applies to court proceedings described in section 7430 filed in a court of the United States (including the Tax Court) after May 7, 1992.

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§ 301.7430-2 Requirements and procedures for recovery of reasonable administrative costs.

(a) *Introduction.* Section 7430(a)(1) provides for the recovery, under certain circumstances, of reasonable administrative costs incurred in connection with an administrative proceeding before the Internal Revenue Service. Paragraph (b) of this section lists the requirements that a taxpayer must