is committed to meaningful consultation with Tribes on substantive matters that have a substantial direct effect on Tribes, in accordance with E.O. 13175 and the Department of the Interior Policy on Consultation with Indian Tribes.

I. Paperwork Reduction Act

This information collection for trust land applications is authorized by OMB Control Number 1076–0100, with an expiration of 08/31/16. The elimination of the requirement to comply with DOJ standards is not expected to have a quantifiable effect on the hour burden estimate for the information collection, but BIA will review whether its current estimates are affected by this change at the next renewal.

J. National Environmental Policy Act

This interim final rule does not constitute a major Federal action significantly affecting the quality of the human environment.

K. Information Quality Act

In developing this interim final rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

L. Effects on the Energy Supply (E.O. 13211)

This interim final rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

M. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the ''COMMENTS'' section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

O. Required Determinations Under the Administrative Procedure Act

We are publishing this interim final rule with a request for comment without prior notice and comment, as allowed under 5 U.S.C. 553(b)(B). Under section 553(b)(B), we find that prior notice and comment are unnecessary because this is a minor, technical action that eliminates an unnecessary requirement. This rule removes the unnecessary requirement that the title evidence the applicant submits must comply with DOJ standards for title evidence. Delay in publishing this rule would unnecessarily continue imposing the unnecessary requirement on applicants and would therefore be contrary to the public interest.

We have requested comments on this interim final rule. We will review any comments received and if we receive significant adverse comments, we will by a future publication in the **Federal Register**, initiate a proposed rulemaking or revise or withdraw this rule.

List of Subjects in 25 CFR Part 151

Indians—lands, Reporting and recordkeeping requirements.

For the reasons given in the preamble, the Department of the Interior amends 25 CFR part 151 as follows:

PART 151—LAND ACQUISITIONS

■ 1. The authority citation for part 151 continues to read as follows:

Authority: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat.1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

■ 2. Revise § 151.13 to read as follows:

§ 151.13 Title review.

(a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she shall require the applicant to furnish title evidence as follows:

(1) Written evidence of the applicant's title or that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust; and

(2) Written evidence of how title was acquired by the applicant or current owner; and

(3) Either:

(i) A current title insurance commitment; or

(ii) The policy of title insurance issued at the time of the applicant's or current owner's acquisition of the land and an abstract of title dating from the time the land was acquired by the applicant or current owner.

(b) After reviewing submitted title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information from the applicant needed to address such issues. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable.

Dated: February 23, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2016–04332 Filed 2–29–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9756]

RIN 1545–AX46

Regulations Under IRC Section 7430 Relating to Awards of Administrative Costs and Attorneys' Fees

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to awards of administrative costs and attorneys' fees. The final regulations conform the regulations to the amendments made in

the Taxpayer Relief Act of 1997 and the IRS Restructuring and Reform Act of 1998. The regulations affect taxpayers seeking attorneys' fees and costs.

DATES:

Effective date: The final regulations are effective on March 1, 2016.

Applicability date: For date of applicability, see § 301.7430–6.

FOR FURTHER INFORMATION CONTACT: Shannon K. Castañeda at (202) 317–5437 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

I. In General

This document contains final amendments to Treasury Regulations under section 7430 of the Internal Revenue Code (Code) relating to awards of administrative and attorneys' fees. Section 7430 generally permits a prevailing party in an administrative or court proceeding to seek an award for reasonable administrative and litigation costs incurred in connection with such proceedings. The amendments incorporate the 1997 and 1998 amendments to section 7430, which were enacted as part of the Taxpayer Relief Act of 1997 (TRA), Public Law 105–34, 111 Stat. 788 (Aug. 5, 1997), and the IRS Restructuring and Reform Act of 1998 (RRA '98), Public Law 105–206, 112 Stat. 685 (Jul. 22, 1998).

The Treasury Department and the Internal Revenue Service published a notice of proposed rulemaking (REG–111833–99) in the **Federal Register**, 74 FR 61589, on November 25, 2009 (the NPRM), proposing amendments to the regulations under section 7430. A public hearing was scheduled for March 10, 2010. The Internal Revenue Service did not receive any requests to testify at the public hearing, and the public hearing was cancelled. Two written comments responding to the NPRM were received and are available for public inspection at *http://www.regulations.gov* or upon request. After consideration of the comments, the proposed regulations are adopted as revised by this Treasury Decision.

II. Statutory Provisions

Section 7430 generally authorizes a court to award administrative and litigation costs, including attorneys' fees, to a 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. To qualify as a ''prevailing party'' a taxpayer must substantially prevail as to the amount in controversy or the most significant issue or set of issues in the proceeding, exhaust the administrative remedies, meet net worth and size limitations, and pay or incur the costs. The taxpayer generally cannot qualify for an award of such costs, however, if the government establishes that its position in the proceeding was substantially justified.

The TRA contained several amendments to section 7430 that are incorporated in the amendments to the regulations. First, the TRA provided that a taxpayer has ninety days after the date the Internal Revenue Service mails to the taxpayer a final decision determining tax, interest, or a penalty, to file an application with the Internal Revenue Service to recover administrative costs. Section 7430 had previously been silent as to the timing for seeking administrative costs. Second, the TRA provided that a taxpayer has ninety days after the date the Internal Revenue Service mails to the taxpayer, by certified or registered mail, a final adverse decision regarding an award of administrative costs, to file a petition with the Tax Court. Section 7430 had previously been silent as to the timing for seeking review in the Tax Court. Third, the TRA clarified the application of the net worth and size limitations imposed by section 7430(c)(4) by providing that individuals filing joint returns should be treated as separate taxpayers for purposes of determining net worth. The TRA added trusts to the list of taxpayers subject to the net worth and size limitations and also specified the date on which the net worth and size determination should be made. Before the TRA's clarification of the net worth and size limitations, section 7430 had stated only that a prevailing party must meet the requirement of the first sentence of section 2412(d)(1)(B) of Title 28. Section 2412(d)(2)(B) establishes the net worth and size limitations of the Equal Access to Justice Act. See 28 U.S.C. 2412 (EAJA). The TRA also added section 7436 to the Code, which gives the Tax Court jurisdiction in certain employment tax cases. Section 7436(d)(2) provides that section 7430 applies to proceedings brought under section 7436.

RRA '98 also contained several amendments affecting section 7430. First, RRA '98 increased the hourly rate limitation for attorneys' fees in section 7430(c)(1) from $110 per hour to $125 per hour. Second, two special factors were added that may be considered to allow an increase in an attorney's hourly rate: (1) Difficulty of the issues presented and (2) local availability of tax expertise. Prior to the enactment of RRA '98, the only special factor included in section 7430(c)(1) was the limited availability of qualified attorneys. Third, RRA '98 added a provision that requires a court to consider whether the Internal Revenue Service has lost cases with substantially similar issues in other circuit courts of appeal in deciding whether the Internal Revenue Service's position was substantially justified. Fourth, RRA '98 created an exception to the requirement that to recover attorneys' fees, the taxpayer must have paid or incurred the fees. The exception provides that if an individual who is authorized to practice before the Tax Court or the Internal Revenue Service is representing the taxpayer on a *pro bono* basis, then the taxpayer may petition for an award of reasonable attorneys' fees in excess of the amounts that the taxpayer paid or incurred, as long as the fee award is ultimately paid to the individual who represented the taxpayer or such individual's employer. The Treasury Department and the Internal Revenue Service are releasing, simultaneously with these final regulations, a revenue procedure detailing the procedures for the recovery of attorneys' fees in the *pro bono* context. Fifth, RRA '98 extended the period for recovery of reasonable administrative costs to include costs incurred after the date on which the first letter of proposed deficiency, commonly known as a 30-day letter, is mailed to the taxpayer. Previously, administrative costs only included costs incurred on or after the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or the date of the notice of deficiency.

Summary of Regulations

The final regulations reflect the changes made by the TRA as originated in the proposed regulations. Clarifying changes included in the proposed regulations and adopted here address the calculation of net worth. Section 7430 imposes net worth and size limitations on who can recover costs. First, the proposed and final regulations specify which limitations with respect to net worth and size apply when a taxpayer is an owner of an unincorporated business. Second, the proposed and final regulations clarify the net worth and size limitations in cases involving partnerships subject to the unified audit and litigation procedures of sections 6221 through 6234 of the Code (the TEFRA partnership procedures).

The final regulations reflect a further clarification that was not included in the proposed regulations. The proposed regulations merely noted that the net

worth of taxpayers who filed joint returns should be calculated separately. The final regulations further explain how the separate calculation will be conducted in various situations. When taxpayers who file joint returns jointly petition the court and incur joint costs, each taxpayer qualifies for a separate net worth limitation of $2 million, but the limitation will be evaluated jointly. As such, taxpayers will meet the net worth limitation so long as their combined assets are equal to or less than $4 million, regardless of how the assets are distributed. This prevents high net worth taxpayers from avoiding the net worth limitation by seeking costs on behalf of a spouse with a lower net worth. When taxpayers file a joint return, but petition the court separately and incur separate costs, the limitation will be evaluated separately. As such, each taxpayer will have his/her assets applied toward a separate $2 million cap for each spouse. This analysis protects the ability of spouses with fewer assets to seek representation when the spouse with higher-value assets is unwilling or unable to incur those costs.

The final regulations do not adopt the proposed rule in §§ 301.7430–5(g)(1) and (2) that the net worth limitation is computed based on the fair market value of the taxpayer's assets. The existing section 7430 regulations do not address this issue and no comments from the public were received on this issue. The existing case law, however, generally recognizes that the net worth calculation is made based on the acquisition costs of the taxpayer's assets. Because the case law is clear and provides an existing standard for determining net worth, the final regulations follow the case law and do not adopt the proposed rule in § 301.7430–5(g)(1) and (2) relating to the determination of the value of the taxpayer's assets. Accordingly, the final regulations add a new paragraph (6) to § 301.7430–5(g) to clarify that for purposes of determining net worth, assets are valued based on the cost of their acquisition.

Consistent with the changes made by RRA '98, the final regulations clarify that a taxpayer may be eligible to recover reasonable administrative costs from the date of the 30-day letter only if at least one issue (other than recovery of administrative costs) remains in dispute as of the date that the Internal Revenue Service takes a position in the administrative proceeding. This requirement follows RRA '98's prevailing party definition. Under the changes made by RRA '98, the position of the United States is established in the administrative proceeding on the earlier of the date the taxpayer receives the notice of the decision of the Internal Revenue Service Office of Appeals or the date of the notice of deficiency. Where the Internal Revenue Service concedes an issue in the Office of Appeals prior to issuing a notice of deficiency or notice of the decision of the Office of Appeals, the United States does not take a position, so an award of administrative costs is not available. Where the Internal Revenue Service concedes an issue in the notice of decision, the position of the United States is necessarily substantially justified. *See, for example, Fla. Country Clubs, Inc.* v. *Commissioner,* 122 T.C. 73, 78–86 (2004), *aff'd,* 404 F.3d 1291 (11th Cir. 2005) (Where the Office of Appeals determined that taxpayer did not owe any additional tax after issuing a 30-day letter, but without ever issuing a notice of deficiency or notice of determination, the Internal Revenue Service did not take a position), *Purciello* v. *Commissioner,* T.C. Memo. 2014–50 (Where the Internal Revenue Service conceded the matter at issue in full in the notice of decision, the Internal Revenue Service was substantially justified).

Summary of Comments and Explanation of Revisions

The Treasury Department and the Internal Revenue Service received two written comments in response to the NPRM, both of which related to the provisions in the proposed regulations providing for the award of reasonable attorneys' fees when an individual is representing a party on a *pro bono* basis. This section addresses those comments. This section also describes the significant differences between the rules proposed in the NPRM and those adopted in the final regulations.

As discussed in this preamble, prior to RRA '98, only those costs incurred by the taxpayer were eligible for payment under section 7430. RRA '98 provided that the court could award costs in excess of the costs actually incurred by the taxpayer if those costs were less than the reasonable attorneys' fees because an individual is representing the taxpayer on a *pro bono* basis. The statute defined *pro bono* as representation provided for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. Finally, the statute directed that awards for *pro bono* representation must be paid to the representative or that representative's employer, as opposed to section 7430's general requirement that awards are paid to the taxpayer.

1. Persons on Whose Behalf Pro Bono Representation Must Be Provided

Section 7430 establishes net worth and size limitations that a taxpayer must meet in order to recover administrative or litigation costs. The proposed regulations included an additional requirement related to a taxpayer's net worth: They stated that, for reasonable administrative costs to be awarded for legal services provided on a *pro bono* basis, the services must be provided to or on behalf of either (A) persons of limited financial means who meet the eligibility requirements for programs funded by the Legal Services Corporation, or (B) organizations operating primarily to address the needs of persons with limited means if payment of a standard legal fee would significantly deplete the organization's financial resources. Both of the commentators recommended revising the regulations to provide that organizations to whom or on whose behalf representation may be provided include low income taxpayer clinics, clinics participating in the Internal Revenue Service student tax clinic program, and clinics operating as approved clinics in the United States Tax Court. Both commentators also proposed changes in the proposed regulations' income limitation for persons on whose behalf *pro bono* legal representation must be provided. The proposed regulations provided an income limitation based on the eligibility requirements for programs funded by the Legal Services Corporation (see 42 U.S.C. 2996e(a)(1)(A)), which is 125 percent of the current Federal Poverty Guidelines published by the United States Department of Health and Human Services. One commentator recommended that the limitation be expanded to include individuals and households whose incomes do not exceed 250 percent of the poverty level as determined in accordance with criteria established by the Director of the Office of Management and Budget. The other commentator recommended that the regulations should not contain an income threshold for persons on whose behalf pro bono representation is provided, and recommended that the only limitation should be that *pro bono* representation must be provided to persons with limited means if payment of a standard legal fee would significantly deplete the person's financial resources.

The Treasury Department and the Internal Revenue Service have carefully considered both comments and have considered the difficulty of establishing

fair and easily applied limitations on eligibility for attorneys' fees for *pro bono* representation based upon the income and financial resources of the taxpayer. The Treasury Department and the Internal Revenue Service have determined that eligibility should not be limited based on the income or financial resources of the recipient of the representation beyond the limit provided by section 7430(c)(4)(A)(ii). As a result, the rule contained in the proposed regulations is not being finalized. This change makes it unnecessary to revise the eligibility requirements as proposed by the commentators.

2. Rate of Reimbursement for Attorneys Who Do Not Have a Customary Hourly Rate

An example in the proposed regulations stated that an award for representation by attorneys employed by a low income taxpayer clinic who do not have a customary hourly rate would be limited to the rate prescribed under section 7430(c)(1)(B). Section 7430(c)(1)(B)(iii) provides for attorneys' fees based on prevailing market rates for the kind or quality of services furnished, except that the fee is limited to a statutory rate of $125 an hour plus cost of living adjustments, unless a special factor justifies a higher rate. One commentator stated that because of the difficulty of determining the prevailing market rates for the kind or quality of services furnished in the case of attorneys representing low income taxpayers, and because of the unlikelihood that a low income taxpayer clinic or student taxpayer clinic program would become involved in a case that would justify a rate in excess of the statutory rate, the rate for *pro bono* attorneys who do not have a customary hourly rate should be set at the statutory rate.

After publishing the proposed regulations, the Treasury Department and the Internal Revenue Service determined that details such as the rate of compensation for *pro bono* attorneys who do not have a customary hourly rate would more logically be contained in a revenue procedure. The Treasury Department and the Internal Revenue Service are releasing simultaneously Rev. Proc. 2016–17, which provides that *pro bono* attorneys who do not charge an hourly rate receive the statutory rate for their services unless they establish that a special factor, as described in section 7430(c)(1)(B)(iii), applies to justify a higher hourly rate. The final regulations, therefore, do not contain the example in the proposed regulations on the rate applicable to *pro bono* attorneys who do not have a customary hourly rate. Instead, these recommendations are taken into account in Rev. Proc. 2016–17.

3. Enhanced Rate Based on Limited Availability of Pro Bono Representatives With Tax Expertise

One commentator recommended a change to the section of the proposed regulations that provided that the limited local availability of tax expertise is a special factor that would justify an award at a rate higher than the statutory rate. The proposed regulations provided that limited local availability of tax expertise is established by demonstrating that a representative possessing tax expertise is not available in the taxpayer's geographical area. The commentator stated that she did not think this special factor produces a fair result in the case of *pro bono* representatives because, even if attorneys possessing tax expertise practice within a taxpayer's geographic area, those attorneys may not be willing or able to take on *pro bono* cases. The commentator suggested that the regulation be revised so that, in *pro bono* cases, the special factor based on the limited local availability of tax expertise would apply if there is no representative possessing tax expertise practicing within the taxpayer's geographic area who is willing or able to represent the taxpayer on a *pro bono* basis.

The Treasury Department and the Internal Revenue Service disagree that the proposed rule does not produce a fair result in the case of *pro bono* representatives. The rule permits the award of an enhanced rate based on the limited local availability of tax expertise because such a circumstance reasonably could have an unfair impact on a taxpayer who pays or incurs liability for attorneys' fees. For example, the taxpayer who must go outside his geographic area to retain a representative with tax expertise might be required to pay more for the representation than the generally prevailing market rate for representatives in the taxpayer's geographic area. Taxpayers who are represented on a pro bono basis are entitled to the enhanced rate in the same manner as taxpayers who incur fees. Therefore, the final regulations adopt the rule in the proposed regulations without change.

4. Payments for Work Performed by Students and Hourly Rates for Students

The proposed regulations did not discuss issues relating to the award of attorneys' fees based on the work of volunteer law students. Both commentators recommended clarifying the proposed regulations to state that payment for work performed by law students should be made to the attorneys under whom the students work or to such an attorney's employer rather than to the law students.

One commentator expressed concern that fees may be awarded based on the work of law students who volunteer in low income taxpayer clinics and clinics participating in the Internal Revenue Service student taxpayer clinic program, but that such students do not have customary hourly rates. The commentator proposed setting an hourly rate for law students at 40 percent of the statutory hourly rate for attorneys. The commentator also requested clarification that the work of law students can be compensated as attorneys' fees or costs regardless of whether the students have special orders authorizing them to practice before the Internal Revenue Service.

The Treasury Department and the Internal Revenue Service agree that awarding fees based on the work of volunteer students may be appropriate and are addressing this issue in a revenue procedure being released contemporaneously with these final regulations. In Rev. Proc. 2016–17, the Treasury Department and the Internal Revenue Service clarify that work performed by students authorized to practice before the Internal Revenue Service or the Tax Court may be compensable at 35 percent of the statutory hourly rate for attorneys, unless the student can demonstrate that a rate in excess of that 35 percent is appropriate, with the award payable to the clinic or organization with which the student is affiliated. Rev. Proc. 2016–17 further clarifies that with respect to students who are not authorized to practice before the Internal Revenue Service or the Tax Court, the requester will have the burden of proving that an award of costs is appropriate and what rate of compensation is reasonable.

5. Effective/Applicability Date

The proposed regulations provided that the changes in §§ 301.7430–2, 301.7430–3, 301.7430–4, and 301.7430–5 would apply to costs incurred and services performed as of the date of publication of the final regulations, without regard to when a petition was filed. That meant that these changes could have applied in cases where a petition was filed before publication of the final regulations in the **Federal Register**. To ensure that these changes are not mandatory for cases in which a

petition was filed before publication of the final regulations in the **Federal Register**, the effective/applicability date in § 301.7430–6 of the final regulations has been revised to provide that the changes in §§ 301.7430–2, 301.7430–3, 301.7430–4, and 301.7430–5 apply to costs incurred and services performed in cases in which the petition was filed on or after the date of publication of the final regulations in the **Federal Register**. However, taxpayers may rely on the changes contained in §§ 301.7430–2, 301.7430–3, 301.7430–4, and 301.7430–5 of the final regulations for costs incurred and services performed in which a petition was filed prior to March 1, 2016.

In addition, no effective/applicability date was proposed with respect to the rules for qualified offers under § 301.7430–7, but one has been added to the final regulations. Accordingly, under § 301.7430–7(f) of the final regulations, section 301.7430–7 applies to qualified offers made in administrative court proceedings described in section 7430 after December 24, 2003, except that section 301.7430–7(c)(8) is effective as of the date these final regulations are published in the **Federal Register**.

Statement of Availability for IRS Document

For copies of recently issued Revenue Procedures, Revenue Ruling, notices and other guidance published in the Internal Revenue Bulletin, visit the IRS Web site at *http://www.irs.gov.*

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal author of these regulations is Shannon K. Castañeda, Office of Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoptions of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 301.7430–0 is amended by:

■ 1. Adding an entry for § 301.7430–3(c)(4).

■ 2. Adding entries to § 301.7430–4, paragraphs (b)(3)(iii)(A) through (F) and (d).

■ 3. Revising the entries for § 301.7430–5.

■ 4. Revising the section heading for § 301.7430–6.

■ 5. Adding entries for §§ 301.7430–7 and 301.7430–8.

The additions and revisions read as follows:

§ 301.7430–0 Table of contents.

* * * * *

§ 301.7430–3 Administrative proceeding and administrative proceeding date.

* * * * *

(c) * * *

(4) First letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals.

* * * * *

§ 301.7430–4 Reasonable administrative costs.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) In general.

(B) Special factor.

(C) Limited availability.

(D) Local availability of tax expertise.

(E) Difficulty of the issues.

(F) Example.

* * * * *

(d) Pro bono representation.

(1) In general.

(2) Requirements.

(3) Nominal fee.

(4) Payment when representation provided for a nominal fee.

(5) Requirements.

(6) Hourly rate.

(7) Examples.

§ 301.7430–5 Prevailing party.

(a) In general.

(b) Position of the Internal Revenue Service.

(c) Examples.

(d) Substantially justified.

(1) In general.

(2) Position in courts of appeal.

(3) Examples.

(4) Included costs.

(5) Examples.

(6) Exception.

(7) Presumption.

(e) Amount in controversy.

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

(1) In general.

(2) Example.

(g) Net worth and size limitations.

(1) Individuals.

(2) Estates and trusts.

(3) Others.

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

(5) Special rule for TEFRA partnerships.

(6) Determining net worth.

(h) Determination of prevailing party.

(i) Examples.

§ 301.7430–6 Effective/applicability dates.

§ 301.7430–7 Qualified offers.

(a) In general.

(b) Requirements for treatment as a prevailing party based upon having made a qualified offer.

(1) In general.

(2) Liability under the last qualified offer.

(3) Liability pursuant to the judgment.

(c) Qualified offer.

(1) In general.

(2) To the United States.

(3) Specifies the offered amount.

(4) Designated at the time it is made as a qualified offer.

(5) Remains open.

(6) Last qualified offer.

(7) Qualified offer period.

(8) Interest as a contested issue.

(d) [Reserved].

(e) Examples.

(f) Effective date.

§ 301.7430–8 Administrative costs incurred in damage actions for violations of section 362 or 524 of the Bankruptcy Code.

(a) In general.

(b) Prevailing party.

(c) Administrative proceeding.

(d) Costs incurred after filing of bankruptcy petition.

(e) Time for filing claim for administrative costs.

(f) Effective date.

■ **Par. 3.** Section 301.7430–1 is amended by revising paragraphs (b)(1)(ii)(A), (d)(1)(i) and (ii) and (d)(2) introductory text to read as follows:

§ 301.7430–1 Exhaustion of administrative remedies.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) Requests an Appeals office conference in accordance with §§ 601.105 and 601.106 of this chapter or any successor published guidance; and

* * * * *

(d) * * *

(1) * * *

(i) The party follows all applicable Internal Revenue Service procedures for contesting the matter (including filing a written protest or claim, requesting an administrative appeal, and participating in an administrative hearing or conference); or

(ii) If there are no applicable Internal Revenue Service procedures, the party submits to the Area Director of the area 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 the requested relief, and the Area Director denies the claim for relief in writing or fails to act on the claim within a reasonable period after the claim is received by the Area Director.

(2) For purposes of paragraph (d)(1)(ii) of this section, a *reasonable period* is—

* * * * *

■ **Par. 4.** Section 301.7430–2 is amended by:

■ 1. Revising paragraph (a).

■ 2. Removing the semicolon at the end of paragraph (c)(3)(i)(B) and adding a period in its place, and adding a sentence at the end of the paragraph.

■ 3. Adding a sentence at the end of paragraph (c)(3)(i)(E).

■ 4. Revising paragraph (c)(3)(ii)(C), adding paragraph (c)(3)(iii)(C)., and revising paragraph (c)(5).

■ 5. Adding a sentence at the end of paragraph (c)(7).

■ 6. Revising paragraph (e).

The additions and revisions read as follows:

§ 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 meet to be entitled to an award of reasonable administrative costs from the Internal Revenue Service. Paragraph (c) of this section describes the procedures that a taxpayer must follow to recover reasonable administrative costs. Paragraphs (b) and (c) apply to requests for administrative costs regarding all administrative proceedings within the Internal Revenue Service.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(B) * * * For costs incurred after January 18, 1999, if the taxpayer alleges that the United States has lost in courts of appeal for other circuits on substantially similar issues, the taxpayer must provide, for each such case, the full name of the case, volume and pages of the reporter in which the opinion appears, the circuit in which the case was decided, and the year of the opinion;

* * * * *

(E) * * * This statement must identify whether the representation is on a pro bono basis as defined in § 301.7430–4(d) and, if so, to whom payment should be made. Specifically, the statement must direct whether payment should be made to the taxpayer's representative or to the representative's employer.

(ii) * * *

(C) For costs incurred after January 18, 1999, if more than $125 per hour (as adjusted for an increase in the cost of living pursuant to § 301.7430–4(b)(3)) is claimed for the fees of a representative in connection with the administrative proceeding, an affidavit is necessary stating that a special factor described in § 301.7430–4(b)(3) is applicable, such as the difficulty of the issues presented in the case or the lack of local availability of tax expertise. If a special factor is claimed based on specialized skills and distinctive knowledge as described in § 301.7430–4(b)(2)(ii), the affidavit should state—

(*1*) Why the specialized skills and distinctive knowledge were necessary in the representation;

(*2*) That there is a limited availability of representatives possessing these specialized skills and distinctive knowledge; and

(*3*) How the representative's education and experience qualifies the representative as someone with the necessary specialized skills and distinctive knowledge.

(iii) * * *

(C) In cases of pro bono representation, time records similar to billing records, detailing the time spent and work completed, must be submitted for the requested fees.

* * * * *

(5) *Period for requesting costs from the Internal Revenue Service.* To recover reasonable administrative costs pursuant to section 7430 and this section, the taxpayer must file a written request for costs within 90 days after the date the final adverse decision of the Internal Revenue Service with respect to all tax, additions to tax, interest, and penalties at issue in the administrative proceeding is mailed or otherwise furnished to the taxpayer. For purposes of this section, *interest* means the interest that is specifically at issue in the administrative proceeding independent of the taxpayer's objections to the underlying tax, additions to tax, and penalties imposed. The final decision of the Internal Revenue Service for purposes of this section is the document that resolves the taxpayer's liability with regard to all tax, additions to tax, interest, 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. For purposes of this section, if the 90th day falls on a Saturday, Sunday, or a legal holiday, the 90-day period shall end on the next succeeding day that is not a Saturday, Sunday, or a legal holiday as defined by section 7503.

* * * * *

(7) * * * Once a notice of decision denying (in whole or in part) an award for reasonable administrative costs is mailed by the Internal Revenue Service via certified mail or registered mail as required by paragraph (c)(6) of this section, a taxpayer may obtain judicial review of that decision by filing a petition for review with the Tax Court prior to the 91st day after the mailing of the notice of decision.

* * * * *

(e) The following examples primarily illustrate paragraph (a) of this section:

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A requests and is granted Appeals office consideration. The administrative file contains certain documents provided by A as substantiation for the tax matters at issue. Appeals determines that the information submitted is insufficient. Appeals then issues a notice of deficiency. After receiving the notice of deficiency but before the 90-day period for filing a petition with the Tax Court has expired, and before filing a petition with the Tax Court, A convinces Appeals that the information previously submitted and

reviewed by Appeals is sufficient and, therefore, the notice of deficiency is incorrect and A owes no additional tax. Pursuant to section 6212(d), the notice of deficiency is rescinded. Appeals then closes the case showing a zero deficiency and mails A a notice to this effect. Assuming that Appeals did not rely on any new information provided by A in rescinding the notice of deficiency and that all of the other requirements of section 7430 are satisfied, A may recover reasonable administrative costs incurred after the date of the 30-day letter (the administrative proceeding date as defined in Treas. Reg. § 301.7430–3(c)). To recover these costs, A must file a request for administrative costs with the Appeals office personnel who settled A's tax matter, or if that person is unknown to A, with the Area Director of the area that considered the underlying matter, within 90 days after the date of mailing of the Office of Appeals' final decision that A owes no additional tax.

Example 2. Taxpayer B files a request for an abatement of interest pursuant to section 6404 and the regulations thereunder. The Area Director issues a notice of proposed disallowance of the abatement request (akin to a 30-day letter). B requests and is granted Appeals office consideration. No agreement is reached with Appeals and the Office of Appeals issues a notice of disallowance of the abatement request. B does not file suit in the Tax Court, but instead contacts the Appeals office within 180 days after the mailing date of the notice of disallowance of the abatement request to attempt to reverse the decision. B convinces the Appeals office that the notice of disallowance is in error. The Appeals office agrees to abate the interest and mails the taxpayer a notification of this decision. The mailing date of the notification from Appeals of the decision to abate interest commences the 90-day period from which the taxpayer may request administrative costs. Assuming that Appeals did not rely on any new information provided by B in reversing its notice of disallowance, and that all of the other requirements of section 7430 are satisfied, B may recover reasonable administrative costs incurred after the date the Area Director issued the notice of proposed disallowance of the abatement request (the administrative proceeding date as defined in Treas. Reg. § 301.7430–3(c)). To recover these costs, B must file a request for costs with the Appeals office personnel who settled B's tax matter, or if that person is unknown to B, with the Area Director of the area that considered the underlying matter within 90 days after the date of mailing of the Office of Appeals' final decision that B is entitled to abatement of interest.

Example 3. Taxpayer C receives a notice of proposed adjustment and employment tax 30-day letter. C requests and is granted Appeals office consideration. The administrative file contains certain documents provided by C to support C's position in the tax matters at issue. Appeals determines that the documents submitted are insufficient. Appeals then issues a notice of determination of worker classification. After receiving the notice of determination of worker classification but before the 90-day period for filing a petition with the Tax Court has expired, C convinces Appeals that the documents previously submitted and reviewed by Appeals adequately support its position and, therefore, C owes no additional employment tax. Appeals then closes the case showing a zero tax adjustment and mails C a no-change letter. Assuming that Appeals did not rely on any new information provided by C in reversing its notice of determination of worker classification, and that all of the other requirements of section 7430 are satisfied, C may recover reasonable administrative costs incurred after the date of the notice of proposed adjustment and 30-day letter (the administrative proceeding date as defined in Treas. Reg. § 301.7430–3(c)). To recover these costs, C must file a request for administrative costs with the Appeals office personnel who settled C's tax matter, or if that person is unknown to C, with the Area Director of the area that considered the underlying matter, within 90 days after the date of mailing of the Office of Appeals' final decision that C owes no additional tax.

■ **Par. 5.** Section 301.7430–3 is amended by:

■ 1. Revising paragraphs (b), (c)(1), and (3).

■ 2. Adding paragraph (c)(4).

■ 3. Revising paragraph (d).

The addition and revisions read as follows:

§ 301.7430–3 Administrative proceeding and administrative proceeding dates.

* * * * *

(b) *Collection action.* A collection action generally includes any action taken by the Internal Revenue Service to collect a tax (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) or any action taken by a taxpayer in response to the Internal Revenue Service's act or failure to act in connection with the collection of a tax (including any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax). A collection action for purposes of section 7430 and this section includes any action taken by the Internal Revenue Service under Chapter 64 of Subtitle F to collect a tax. Collection actions also include collection due process hearings under sections 6320 and 6330 (unless the underlying tax liability is properly at issue), and those actions taken by a taxpayer to remedy the Internal Revenue Service's failure to release a lien under section 6325 or to remedy any unauthorized collection action as described by section 7433, except those collection actions described by section 7433(e). An action or procedure directly relating to a claim for refund after payment of an assessed tax is not a collection action.

(c) *Administrative proceeding date*—(1) *General rule.* For purposes of section 7430 and the regulations thereunder, the term *administrative proceeding date* means the earlier of—

(i) The date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals;

(ii) The date of the notice of deficiency; or

(iii) The date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent.

* * * * *

(3) *Notice of deficiency.* A notice of deficiency is a notice described in section 6212(a), including a notice rescinded pursuant to section 6212(d). For purposes of determining reasonable administrative costs under section 7430 and the regulations thereunder, the following will be treated as a notice of deficiency:

(i) A notice of final partnership administrative adjustment described in section 6223(a)(2).

(ii) A notice of determination of worker classification issued pursuant to section 7436.

(iii) A final notice of determination denying innocent spouse relief issued pursuant to section 6015.

(4) *First letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals.* Generally, the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals is the first letter issued to the taxpayer that describes the proposed adjustments and advises the taxpayer of the opportunity to contact the Office of Appeals. It also may be a claim disallowance or the first letter of determination that allows the taxpayer an opportunity for administrative review in the Office of Appeals.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the Appeals conference no agreement is reached on the tax matters at issue. The Office of Appeals then issues a notice of deficiency. Upon receiving the notice of deficiency, A does not file a petition with the Tax Court. Instead, A pays the deficiency and files a claim for refund. The claim for refund is considered by the Internal Revenue Service and the Area Director issues a notice of proposed claim disallowance. A requests and is granted Appeals office consideration. A convinces Appeals that A's claim is correct and Appeals allows A's claim. A may recover reasonable

administrative costs incurred on or after the date of the notice of proposed deficiency (30-day letter), but only if the other requirements of section 7430 and the regulations thereunder are satisfied. A cannot recover costs incurred prior to the date of the 30-day letter because these costs were incurred before the administrative proceeding date.

Example 2. Taxpayer B files an individual income tax return showing a balance due. No payment is made with the return and the Internal Revenue Service assesses the amount shown on the return. The Internal Revenue Service issues a Notice Of Intent to Levy And Notice Of Your Right To A Hearing pursuant to sections 6330(a) and 6331(d). B timely requests and is granted a Collection Due Process (CDP) hearing. In connection with the CDP hearing, B enters into an installment agreement as a collection alternative. The costs that B incurred in connection with the CDP hearing were not incurred in an administrative proceeding, but rather in a collection action. Accordingly, B may not recover those costs as reasonable administrative costs under section 7430 and the regulations thereunder.

■ **Par. 6.** Section 301.7430–4 is amended by:

■ 1. Removing the language ''such'' the second time it appears in the second sentence and in the fifth sentence of paragraph (b)(2)(ii) and adding the language ''that'' in its place.

■ 2. Revising paragraphs (b)(3)(i) and (b)(3)(iii)(B).

■ 3. Revising the first sentence in paragraph (b)(3)(iii)(C) and adding a new second sentence following the first sentence.

■ 4. Redesignating paragraph (b)(3)(iii)(D) as paragraph (b)(3)(iii)(F), adding new paragraphs (b)(3)(iii)(D) and (b)(3)(iii)(E), and revising newly redesignated paragraph (b)(3)(iii)(F).

■ 5. Revising paragraph (c)(4).

■ 6. Adding paragraph (d).

The additions and revisions read as follows:

§ 301.7430–4 Reasonable administrative costs.

* * * * *

(b) * * *

(3) *Limitation on fees for a representative*—(i) *In general.* Except as otherwise provided in this section, fees incurred after January 18, 1999, and described in paragraph (b)(1)(iv) of this section that are recoverable under section 7430 and the regulations thereunder as reasonable administrative costs may not exceed $125 per hour (as adjusted for an increase in the cost of living and, if appropriate, a special factor adjustment).

* * * * *

(iii) * * *

(B) *Special factor.* A *special factor* is a factor, other than an increase in the cost of living, that justifies an increase in the $125 per hour limitation of section 7430(c)(1)(B)(iii). The undesirability of the case, the work and the ability of counsel, the results obtained, and customary fees and awards in other cases, are factors applicable to a broad spectrum of litigation and do not constitute special factors for the purpose of increasing the $125 per hour limitation. By contrast, the limited availability of a specially qualified representative for the proceeding, the limited local availability of tax expertise, and the difficulty of the issues are special factors justifying an increase in the $125 per hour limitation.

(C) *Limited availability.* Limited availability of a specially qualified representative is established by demonstrating that a specially qualified representative for the proceeding is not available at the $125 per hour rate (as adjusted for an increase in the cost of living). The representative's special qualification must be based on nontax expertise. * * *

(D) *Limited local availability of tax expertise.* Limited local availability of tax expertise is established by demonstrating that a representative possessing tax expertise is not available in the taxpayer's geographical area. Initially, this showing may be made by submission of an affidavit signed by the taxpayer, or by the taxpayer's counsel, that no representative possessing tax expertise practices within a reasonable distance from the taxpayer's principal residence or principal office. The hourly rate charged by representatives in the geographical area is not relevant in determining whether tax expertise is locally available. If the Internal Revenue Service challenges this initial showing, the taxpayer may submit additional evidence to establish the limited local availability of a representative possessing tax expertise.

(E) *Difficulty of the issues.* In determining whether the difficulty of the issues justifies an increase in the $125 per hour limitation on the applicable hourly rate, the Internal Revenue Service will consider the following factors:

(*1*) The number of different provisions of law involved in each issue.

(*2*) The complexity of the particular provision or provisions of law involved in each issue.

(*3*) The number of factual issues present in the proceeding.

(*4*) The complexity of the factual issues present in the proceeding.

(F) *Example.* The provisions of this section are illustrated by the following example:

Example. Taxpayer A is represented by B, a CPA and attorney with a LL.M. Degree in Taxation with Highest Honors who regularly handles cases dealing with TEFRA partnership issues. B represents A in an administrative proceeding involving TEFRA partnership issues that is subject to the provisions of this section. Assuming A qualifies for an award of reasonable administrative costs by meeting the requirements of section 7430, the amount of the award attributable to the fees of B may not exceed the $125 per hour limitation (as adjusted for an increase in the cost of living), absent a special factor. B is not a specially qualified representative because extraordinary knowledge of the tax laws does not constitute distinctive knowledge or a unique and specialized skill constituting a special factor. A higher rate may be justified by another special factor, that is, the limited local availability of tax expertise or the difficulty of the issues.

* * * * *

(c) * * *

(4) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. After incurring fees for representation during the Internal Revenue Service's examination of A's income tax return, A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the conference no agreement is reached on the tax matters at issue. The Internal Revenue Service then issues a notice of deficiency. Upon receiving the notice of deficiency, A discontinues A's administrative efforts and files a petition with the Tax Court. A's costs incurred before the date of the mailing of the 30-day letter are not reasonable administrative costs because they were incurred before the administrative proceeding date. Similarly, A's costs incurred in connection with the preparation and filing of a petition with the Tax Court are litigation costs and not reasonable administrative costs.

Example 2. Assume the same facts as in *Example 1* except that after A receives the notice of deficiency, in addition to petitioning the Tax Court, A recontacts Appeals and A convinces Appeals that the information previously submitted during the review by Appeals is sufficient and, therefore, the notice of deficiency is incorrect and A owes no additional tax. The Internal Revenue Service and A agree to a stipulated decision in the Tax Court case to reflect Appeals' decision. The Tax Court enters the decision. If A seeks administrative costs, A may recover costs incurred after the date of the mailing of the 30-day letter, costs incurred in recontacting Appeals after the issuance of the notice of deficiency, and costs incurred up to the time the Tax Court petition was filed, as reasonable administrative costs, but only if the other requirements of section 7430 and the regulations thereunder are satisfied. The costs incurred before the date of the mailing of the 30-day letter are not reasonable administrative costs because they were incurred before the administrative proceeding date, as set forth in § 301.7430–3(c)(1)(iii). A's costs incurred in connection with the filing of a petition with the Tax

Court are not reasonable administrative costs because those costs are litigation costs. Similarly, A's costs incurred after the filing of the petition are not reasonable administrative costs, as they are litigation costs.

(d) *Pro bono representation*—(1) *In general.* Fees recoverable under section 7430 and the regulations thereunder as reasonable administrative costs may exceed the attorneys' fees paid or incurred by the prevailing party if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party on a pro bono basis. In addition to attorneys' fees, reasonable costs incurred or paid by the individual providing the pro bono representation that are normally billed separately also may be recovered under this section. The Treasury Department and the Internal Revenue Service may, in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin, provide for additional rules that apply for awards of costs for pro bono representation for purposes of this paragraph (d).

(2) *Requirements.* Pro bono representation is established by demonstrating—

(i) Representation was provided for no fee or for a fee that (taking into account all the facts and circumstances) constitutes a nominal fee;

(ii) The representative intended to provide representation for no fee or for a nominal fee from the commencement of the representation. Intent to provide representation for no fee or for a nominal fee may be demonstrated through documentation such as a retainer agreement. An individual will not be considered to have represented a client on a pro bono basis if the facts demonstrate that the individual anticipated a fee greater than a nominal fee or provided representation on a contingency fee basis. The fact that the representative intended to seek recovery of fees under section 7430 will not prevent the representative from satisfying this requirement.

(3) *Nominal fee.* A *nominal fee* is defined as a fee that is insignificantly small or minimal. A nominal fee is a trivial payment, bearing no relation to the value of the representation provided, taking into account all the facts and circumstances.

(4) *Payment when representation provided at no charge or for a nominal fee.* A prevailing party who receives representation at no charge or for a nominal fee and who satisfies the requirements under this section is eligible to receive reasonable fees in excess of the fees actually paid or incurred. Payment will be made to the representative or the representative's employer.

(5) *Recordkeeping.* Contemporaneous records must be maintained, demonstrating the work performed and the time allocated to each task. These records should contain similar information to billing records.

(6) *Examples.* The provisions of this section are illustrated by the following example:

Example 1. Taxpayer A, an attorney, files a petition with the Tax Court and pays a $60 filing fee. A appears pro se in the court proceeding. If A prevails, he will not be entitled to an award of reasonable litigation costs for his services. A is rendering services on his own behalf, not providing pro bono representation. His lost opportunity costs are not compensable under section 7430. A may recover the filing fee as a litigation cost, but only if the other requirements of section 7430 and the regulations thereunder are satisfied.

■ **Par. 7.** Section 301.7430–5 is revised to read as follows:

§ 301.7430–5 Prevailing party.

(a) *In general.* For purposes of an award of reasonable administrative costs under section 7430 in the case of administrative proceedings commenced after July 30, 1996, a taxpayer is a prevailing party (other than by reason of section 7430(c)(4)(E)) only if—

(1) At least one issue (other than recovery of administrative costs) remains in dispute as of the date that the Internal Revenue Service takes a position in the administrative proceeding, as described in paragraph (b) of this section;

(2) The position of the Internal Revenue Service was not substantially justified;

(3) The taxpayer substantially prevails as to the amount in controversy or with respect to the most significant issue or set of issues presented; and

(4) The taxpayer satisfies the net worth and size limitations referenced in paragraph (f) of this section.

(b) *Position of the Internal Revenue Service.* The position of the Internal Revenue Service in an administrative proceeding is the position taken by the Internal Revenue Service as of the earlier of—

(1) The date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; or

(2) The date of the notice of deficiency or any date thereafter.

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

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A pays the amount of the proposed deficiency and files a claim for refund. A's claim is considered and a notice of proposed claim disallowance is issued by the Area Director. A does not request an Appeals office conference and the Area Director issues a notice of claim disallowance. A then files suit in a United States District Court. A cannot recover reasonable administrative costs because the notice of claim disallowance is not a notice of the decision of the Internal Revenue Service Office of Appeals or a notice of deficiency. Accordingly, the Internal Revenue Service has not taken a position in the administrative proceeding pursuant to section 7430(c)(7)(B).

Example 2. Taxpayer B receives a notice of proposed deficiency (30-day letter). B disputes the proposed adjustments and requests an Appeals office conference. The Appeals office determines that B has no additional tax liability. B requests administrative costs from the date of the 30-day letter. B is not the prevailing party and may not recover administrative costs because all of the proposed adjustments in the case were resolved as of the date that the Internal Revenue Service took a position in the administrative proceeding.

(d) *Substantially justified*—(1) *In general.* The position of the Internal Revenue Service is substantially justified if it has a reasonable basis in both fact and law. A significant factor in determining whether the position of the Internal Revenue Service is substantially justified as of a given date is whether, on or before that date, the taxpayer has presented all relevant information under the taxpayer's control and relevant legal arguments supporting the taxpayer's position to the appropriate Internal Revenue Service personnel. The appropriate Internal Revenue Service personnel are personnel responsible for reviewing the information or arguments, or personnel who would transfer the information or arguments in the normal course of procedure and administration to the personnel who are responsible.

(2) *Position in courts of appeal.* Whether the United States has won or lost an issue substantially similar to the one in the taxpayer's case in courts of appeal for circuits other than the one to which the taxpayer's case would be appealable should be taken into consideration in determining whether the Internal Revenue Service's position was substantially justified.

(3) *Example.* The provisions of this section (d) are illustrated by the following example:

Example. The Internal Revenue Service, in the conduct of a correspondence examination of taxpayer A's individual income tax return, requests substantiation from A of claimed medical expenses. A does not respond to the request and the Internal Revenue Service issues a notice of deficiency. After receiving the notice of deficiency, A presents sufficient

information and arguments to convince a tax compliance officer that the notice of deficiency is incorrect and that A owes no tax. The revenue agent then closes the case showing no deficiency. Although A incurred costs after the issuance of the notice of deficiency, A is unable to recover these costs because, as of the date these costs were incurred, A had not presented relevant information under A's control and relevant legal arguments supporting A's position to the appropriate Internal Revenue Service personnel. Accordingly, the position of the Internal Revenue Service was substantially justified at the time the costs were incurred.

(4) *Included costs.* (i) An award of reasonable administrative costs shall only include costs incurred on or after the administrative proceeding date as defined in section 301.7430–3(c) of this chapter.

(ii) If the Internal Revenue Service takes a position in an administrative proceeding, as defined in paragraph (b) of this section, and the position is not substantially justified, the taxpayer may be permitted to recover costs incurred before the position was taken, but not before the dates set forth in this paragraph (d)(4).

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

Example 1. Pursuant to section 6672, taxpayer D receives from the Area Director Collection Operations (Collection) a proposed assessment of trust fund taxes (Trust Fund Recovery Penalty). D requests and is granted Appeals office consideration. Appeals considers the issues and decides to uphold Collection's recommended assessment. Appeals notifies D of this decision in writing. Collection then assesses the tax and notice and demand is made. D timely pays the minimum amount required to commence a court proceeding, files a claim for refund, and furnishes the required bond. Collection disallows the claim, but Appeals, on reconsideration, reverses its original position, thus upholding D's position. If Appeals' initial determination was not substantially justified, D may recover administrative costs incurred on or after the mailing of the proposed assessment of trust fund taxes, because the proposed assessment is the first determination letter that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals.

Example 2. Taxpayer E receives a notice of proposed deficiency (30-day letter). E pays the amount of the proposed deficiency and files a claim for refund. E's claim is considered and a notice of proposed disallowance is issued by the Area Director. E requests and is granted Appeals office consideration. No agreement is reached with Appeals and the Office of Appeals issues a notice of claim disallowance. E does not file suit in a United States District Court but instead contacts the Appeals office to attempt to reverse the decision. E convinces the Appeals officer that the notice of claim disallowance is in error. The Appeals officer then abates the assessment. E may recover reasonable administrative costs if the position taken in the notice of claim disallowance issued by the Office of Appeals was not substantially justified and the other requirements of section 7430 and the regulations thereunder are satisfied. If so, E may recover administrative costs incurred from the mailing date of the 30-day letter because the requirements of paragraph (c)(2) of this section are met. E cannot recover the costs incurred prior to the mailing of the 30-day letter because they were incurred before the administrative proceeding date.

(6) *Exception.* If the position of the Internal Revenue Service was substantially justified with respect to some issues in the proceeding and not substantially justified with respect to the remaining issues, any award of reasonable administrative costs to the taxpayer may be limited to only reasonable administrative costs attributable to those issues with respect to which the position of the Internal Revenue Service was not substantially justified. If the position of the Internal Revenue Service was substantially justified for only a portion of the period of the proceeding and not substantially justified for the remaining portion of the proceeding, any award of reasonable administrative costs to the taxpayer may be limited to only reasonable administrative costs attributable to that portion during which the position of the Internal Revenue Service was not substantially justified. Where an award of reasonable administrative costs is limited to that portion of the administrative proceeding during which the position of the Internal Revenue Service was not substantially justified, whether the position of the Internal Revenue Service was substantially justified is determined as of the date any cost is incurred.

(7) *Presumption.* If the Internal Revenue Service did not follow any applicable published guidance in an administrative proceeding commenced after July 30, 1996, the position of the Internal Revenue Service, on those issues to which the guidance applies and for all periods during which the guidance was not followed, will be presumed not to be substantially justified. This presumption may be rebutted. For purposes of this paragraph (d)(7), the term *applicable published guidance* means final or temporary regulations, revenue rulings, revenue procedures, information releases, notices, and announcements published in the Internal Revenue Bulletin and, if issued to or with respect to the taxpayer, private letter rulings, technical advice memoranda, and determination letters (§ 601.601(d)(2) of this chapter). Also, for purposes of this paragraph (d)(7), the term administrative proceeding includes only those administrative proceedings or portions of administrative proceedings occurring on or after the administrative proceeding date as defined in § 301.7430–3(c).

(e) *Amount in controversy.* The amount in controversy shall include the amount in issue as of the administrative proceeding date as increased by any amounts subsequently placed in issue by any party. The amount in controversy is determined without increasing or reducing the amount in controversy for amounts of loss, deduction, or credit carried over from years not in issue.

(f) *Most significant issue or set of issues presented.* (1) *In general.* Where the taxpayer has not substantially prevailed with respect to the amount in controversy the taxpayer may nonetheless be a prevailing party if the taxpayer substantially prevails with respect to the most significant issue or set of issues presented. The issues presented include those raised as of the administrative proceeding date and those raised subsequently. Only in a multiple issue proceeding can a most significant issue or set of issues presented exist. However, not all multiple issue proceedings contain a most significant issue or set of issues presented. An issue or set of issues constitutes the most significant issue or set of issues presented if, despite involving a lesser dollar amount in the proceeding than the other issue or issues, it objectively represents the most significant issue or set of issues for the taxpayer or the Internal Revenue Service. This may occur because of the effect of the issue or set of issues on other transactions or other taxable years of the taxpayer or related parties.

(2) *Example.* The provisions of this section may be illustrated by the following example:

Example. In the purchase of an ongoing business, Taxpayer F obtains from the previous owner of the business a covenant not to compete for a period of five years. On audit of F's individual income tax return for the year in which the business was acquired, the Internal Revenue Service challenges the basis assigned to the covenant not to compete and a deduction taken as a business expense for a seminar attended by F. Both parties agree that the covenant not to compete is amortizable over a period of five years; however, the Internal Revenue Service asserts that the proper basis of the covenant is $25,000, while F asserts the basis is $50,000 and claims a deduction of $10,000 in the year in which the business was acquired. F deducted $12,000 for the seminar. The Internal Revenue Service determines that the deduction for the seminar should be

disallowed entirely. In the notice of deficiency, the Internal Revenue Service adjusts the amortization deduction to reflect the change to the basis of the covenant not to compete, and disallows the seminar expense. Thus, of the two adjustments determined for the year under audit, the adjustment attributable to the disallowance of the seminar is larger than that attributable to the covenant not to compete. Due to the impact on the next succeeding four years, however, the covenant not to compete adjustment is the most significant issue to both F and the Internal Revenue Service.

(g) *Net worth and size limitations*—(1) *Individuals.* A taxpayer who is a natural person meets the net worth and size limitations of this paragraph if the taxpayer's net worth does not exceed two million dollars. For purposes of determining net worth, individuals filing a joint return, and jointly incurring administrative or litigation costs shall have their net worth determined jointly, with all assets and liabilities treated as joint for purposes of the net worth evaluation, and applying a joint cap of four million dollars. Individuals who file a joint return, but incur separate administrative or litigation costs, by retaining separate representation, and/or seeking individual administrative review or petitioning the court individually, such as under section 6015, shall have their net worth determined separately, with only those assets and liabilities reasonably attributable to each spouse considered against separate caps of two million dollars per spouse.

(2) *Estates and trusts.* An estate or a trust meets the net worth and size limitations of this paragraph if the estate or trust's net worth does not exceed two million dollars. The net worth of an estate shall be determined as of the date of the decedent's death provided the date of death is prior to the date the court proceeding is commenced. The net worth of a trust shall be determined as of the last day of the last taxable year involved in the proceeding.

(3) *Others.* (i) A taxpayer that is a partnership, corporation, association, unit of local government, or organization (other than an organization described in paragraph (g)(4) of this section) meets the net worth and size limitations of this paragraph if, as of the administrative proceeding date:

(A) The taxpayer's net worth does not exceed seven million dollars; and

(B) The taxpayer does not have more than 500 employees.

(ii) A taxpayer who is a natural person and owns an unincorporated business is subject to the net worth and size limitations contained in paragraph (g)(3)(i) of this section if the tax at issue (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) relates directly to the business activities of the unincorporated business.

(4) *Special rule for charitable organizations and certain cooperatives.* An organization described in section 501(c)(3) exempt from taxation under section 501(a), or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a) (as in effect on October 22, 1986), meets the net worth and size limitations of this paragraph if, as of the administrative proceeding date, the organization or cooperative association does not have more than 500 employees.

(5) *Special rule for TEFRA partnership proceedings.* (i) In cases involving partnerships subject to the unified audit and litigation procedures of subchapter C of chapter 63 of the Internal Revenue Code (TEFRA partnership cases), the TEFRA partnership meets the net worth and size limitations requirements of this paragraph (g) if, on the administrative proceeding date—

(A) The partnership's net worth does not exceed seven million dollars; and

(B) The partnership does not have more than 500 employees.

(ii) In addition, each partner requesting fees pursuant to section 7430 must meet the appropriate net worth and size limitations set forth in paragraph (g)(1), (g)(2), or (g)(3) of this section. For example, if a partner is an individual, his or her net worth must not exceed two million dollars as of the administrative proceeding date. If the partner is a corporation, its net worth must not exceed seven million dollars and it must not have more than 500 employees.

(6) *Determining net worth.* For purposes of determining net worth under this paragraph (g), assets are valued based on the cost of their acquisition.

(h) *Determination of prevailing party.* If the final decision with respect to the tax, interest, or penalty is made at the administrative level, the determination of whether a taxpayer is a prevailing party shall be made by agreement of the parties, or absent an agreement, by the Internal Revenue Service. See § 301.7430–2(c)(7) regarding the right to appeal the decision of the Internal Revenue Service denying (in whole or in part) a request for reasonable administrative costs to the Tax Court.

■ **Par. 8.** Section 301.7430–6 is revised to read as follows:

§ 301.7430–6 Effective/applicability dates.

Sections 301.7430–2 through 301.7430–6, other than §§ 301.7430–2(b)(2), (c)(3)(i)(B), (c)(3)(i)(E), (c)(3)(ii)(C), (c)(3)(iii)(C), (c)(5), (c)(7), and (e); §§ 301.7430–3(c)(1), (c)(3), (c)(4), and (d); §§ 301.7430–4(b)(3)(i), (b)(3)(ii), (b)(3)(iii)(B), (b)(3)(iii)(C), (b)(3)(iii)(D), (b)(3)(iii)(E), (b)(3)(iii)(F), (c)(2)(ii), (c)(4), and (d); and §§ 301.7430–5(a), (b), (c)(3), (d)(2), (d)(3), (d)(4), (d)(5), (d)(7), (f)(2), (g)(1), (g)(2), (g)(3), (g)(5), and (g)(6) apply to claims for reasonable administrative costs filed with the Internal Revenue Service after December 23, 1992, with respect to costs incurred in administrative proceedings commenced after November 10, 1988. Section 301.7430–2(c)(5) is applicable to costs incurred and services performed in cases in which the petition was filed on or after March 1, 2016, except for the last two sentences, which are applicable March 23, 1993. Sections 301.7430–2(b)(2), and (c)(3)(i)(B) (except the last sentence); 301.7430–4(b)(3)(ii), (b)(3)(iii)(C) (except the first two sentences), and (c)(2)(ii) (except for references to the statutory cap as $125); and 301.7430–5(a) (except the parenthetical of 5(a) and all of 5(a)(1)), and the first and last sentence of (d)(7) are applicable for administrative proceedings commenced after July 30, 1996. Sections 301.7430–1(e), 301.7430–2(c)(2), 7430–3(a)(4) and (b) are applicable with respect to actions taken by the Internal Revenue Service after July 22, 1998. The last sentence of § 301.7430–2(c)(3)(i)(B), the first two sentences of § 301.7430–2(b)(3)(iii)(C), §§ 301.7430–2(c)(3)(i)(E), (c)(3)(ii)(C), (c)(3)(iii)(C), (c)(7), (e); 301.7430–3(c)(1), (c)(3), (c)(4), (d); 301.7430–4(b)(3)(i), (b)(3)(iii)(B), (b)(3)(iii)(E), (b)(3)(iii)(F), (c)(2)(ii) (to the extent it references the statutory cap as $125), (c)(4), (d); the parenthetical of § 301.7430–5(a) and §§ 301.7430–5(a)(1), (b), (d)(2), (d)(3), (d)(4), (d)(5), (d)(7), except the first and last sentences, (f)(2), (g)(1), (g)(2), (g)(3), (g)(5), and (g)(6) apply to costs incurred and services performed in cases in which the petition was filed on or after March 1, 2016.

■ **Par. 9.** Section 301.7430–7 is amended by:

■ 1. Adding paragraph (c)(8).

■ 2. Amending paragraph (e) by adding *Examples 16* and *17.*

■ 3. Revising paragraph (f).

The additions and revisions read as follows:

§ 301.7430–7 Qualified offers.

* * * * *

(c) * * *

(8) *Interest as a contested issue.* To constitute a qualified offer, an offer must specify the offered amount of the taxpayer's liability (determined without

regard to interest, unless interest is a contested issue in the proceeding), as provided in paragraphs (c)(1)(ii) and (c)(3) of this section. Therefore, a qualified offer generally may only include an offer to compromise tax, penalties, additions to the tax, and additional amounts. Interest may only be included in a qualified offer if interest is a contested issue in the proceeding. For purposes of this section, interest is a contested issue in the proceeding only if the court in which the proceeding could be brought would have jurisdiction to determine the amount of interest due on the underlying tax, penalties, additions to the tax, and additional amounts. Examples of proceedings in which interest might be a contested issue include proceedings in which the increased interest rate for large corporate underpayments under section 6621(c) is imposed by the Internal Revenue Service and interest abatement proceedings brought under section 6404. Interest is not a contested issue in the proceeding if the court that would have jurisdiction over the proceeding would not have jurisdiction to determine the amount or rate of interest, regardless of whether the taxpayer attempts to raise interest as an issue in the proceeding. Consequently, interest will not be a contested issue in the vast majority of tax cases because they merely involve the straightforward application of statutory interest under section 6601. Accordingly, in those cases, interest may not be included in the offer.

* * * * *

(e) * * *

Example 16. Qualified offer may not compromise interest unless it is a contested issue. Taxpayer J receives a notice of deficiency making an adjustment resulting in a deficiency in tax of $6,500 plus a penalty of $500. Interest is not a contested issue in the proceeding. Within the qualified offer period, J submits a written offer to settle the case for a deficiency of $1,000, including all taxes, penalties, and interest. The offer states that it is a qualified offer for purposes of section 7430(g) and that it will remain open for acceptance by the Internal Revenue Service for a period of 90 days. Section 7430(g)(2)(B) and paragraph (c)(3) of this section state that the amount of a qualified offer must be without regard to interest unless interest is at issue in the proceeding. Since J's offer attempts to compromise interest, which is not a contested issue in the proceeding, it is not a qualified offer.

Example 17. Qualified offer based on new defense or legal theory. Taxpayers K and L received a statutory notice of deficiency for tax year 2005, a tax year when they were married and filed a joint income tax return. Taxpayer K files a separate petition claiming innocent spouse relief and simultaneously submits an offer purporting to be a qualified offer. The offer states that K is entitled to innocent spouse relief and offers to settle the 2005 deficiency as to K. K's innocent spouse claim was not raised during K and L's audit, nor was it raised during their appeals conference. Additionally, at no time prior to or contemporaneously with submitting the offer did K file with the Internal Revenue Service a Form 8857, Request for Innocent Spouse Relief, or otherwise provide the information specified in § 1.6015–5(a) of this chapter. K's offer is not a qualified offer because K did not file a Form 8857 or otherwise provide substantiation or legal and factual arguments necessary to allow for informed consideration of the merits of the innocent spouse claim as required by paragraph (c)(4) of this section, contemporaneously with the offer or prior to making the offer.

(f) *Effective/applicability date.* This section is applicable with respect to qualified offers made in administrative or court proceedings described in section 7430 after December 24, 2003, except that paragraph (c)(8) is effective as of *March 1, 2016.*

§§ 301.7430–1, 301.7430–2, 301.7430–4, and 301.7430–5 [Amended]

■ **Par. 10.** For each section listed in the table, remove the language in the ''Remove'' column and add in its place the language in the ''Add'' column as set forth below:

Section	Remove	Add
§ 301.7430–1(f)(2)(i)	district director	Internal Revenue Service office
§ 301.7430–1(f)(3)(ii)	district director	Internal Revenue Service office
§ 301.7430–1(f)(3)(iii)	district director	Internal Revenue Service office
§ 301.7430–1(f)(4)(i)	district director	Internal Revenue Service office
§ 301.7430–1(g) *Example 6* third and fourth sentences	district director	Internal Revenue Service office
§ 301.7430–1(g) *Example 7* third and fourth sentences	district director	Internal Revenue Service office
§ 301.7430–1(g) *Example 8* second and fourth sentences	district director	Internal Revenue Service office
§ 301.7430–1(g) *Example 9* second sentence	such	these
§ 301.7430–2(b)(2) fourth and fifth sentences	such	these
§ 301.7430–2(c)(4) first sentence	which	that
§ 301.7430–2(c)(6) second sentence	such	the
§ 301.7430–4(b)(3)(ii) first and second sentences	$110	$125
§ 301.7430–4(c)(2)(i) third sentence	Such	These
§ 301.7430–4(c)(2)(i) fourth sentence	which	that
§ 301.7430–4(c)(2)(ii) second and third sentences	$110	$125
§ 301.7430–5(h) first sentence	such	an

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: January 19, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Occupational Safety and Health Standards

CFR Correction

In Title 29 of the Code of Federal Regulations, Parts 1900 to § 1910.999, revised as of July 1, 2015, on page 243, in § 1910.106, paragraph (a)(14) introductory text is reinstated to read as follows:

§ 1910.106 Flammable liquids.

* * * * *

(14) *Flashpoint* means the minimum temperature at which a liquid gives off vapor within a test vessel in sufficient concentration to form an ignitable mixture with air near the surface of the