

AOD-103477-02

CC:PA:APJP:Br3TCBelouin

### **ACTION ON DECISION**

Subject: Curell v. United States,  
2001-2 U.S.T.C. ¶ 50,740, 88 AFTR2d 2001-5501 (S.D. Ohio  
2001)

**Issue:** Does an LL.M. in Taxation qualify as a “special factor” justifying an award of attorneys’ fees to plaintiff’s counsel in excess of the statutory rate under I.R.C. § 7430?

**Discussion:** Taxpayers filed a delinquent return claiming a refund. At the time they filed their return, the Service took the position that the “timely mailed is timely filed” rule of I.R.C. § 7502(a) did not apply to claims for refund on delinquent original returns. The Service disallowed the claim as untimely because, although the taxpayers mailed the return within the 3 year claim period of I.R.C. §6511(b)(2)(A), the return was not delivered until after the 3 year period expired. After the taxpayers filed suit, the Government changed its position. See Weisbart v. United States, 222 F.3d 93 (2<sup>d</sup> Cir. 2000), acq. 2000-2 C.B. xiii; 2000 AOD LEXIS 7; AOD CC-2000-09. In light of the acquiescence in Weisbart, the Government conceded this case prior to trial.

In a motion for attorneys’ fees, the taxpayers argued for a higher rate because their attorney had “specialized expertise in tax matters” and an LL.M. in Taxation. The Curell court awarded attorneys’ fees, finding the Service’s position was not substantially justified. In doing so, the court allowed an increase over the hourly rate allowed by section 7430(c)(1)(B)(iii) for the period in question.

The increased rate is only permitted if the court determines that a “special factor” justifies a higher rate. The statute lists, as non-exclusive examples of special factors, the limited availability of qualified attorneys, the difficulty of the issues presented in the case, and the local availability of tax expertise. The example in Treas. Reg. § 301.7430-4(b)(3)(iii)(D) is specifically on point as to what constitutes a special factor for adjustment. In the example, the taxpayer’s attorney has an LL.M. in Taxation with Highest Honors and regularly deals with TEFRA partnership matters. The regulation

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concludes that “even extraordinary knowledge of the tax laws does not constitute distinctive knowledge or a unique and specialized skill constituting a special factor.” See also Regimbal v. United States, 2001-2 U.S.T.C. ¶ 50,583; 2001-2 U.S.T.C. ¶ 60,414; 88 A.F.T.R.2d 5330 (E.D. Wash. 2001) (no special factors, including attorney’s LL.M. in Taxation, to justify increased fee under I.R.C. § 7430); Cozean v. Commissioner, 109 T.C. 227 (1997) (same); Tinsley v. Commissioner, T.C. Memo 1992-195 (1992) (same); Herman v. United States, 2000 U.S. Dist. LEXIS 10768 (E.D. Tenn. 2000) (statutory amount awarded under section 7430, court not convinced attorney’s expertise, including only LL.M in the area, necessary for taxpayer’s success). Although Cozean and Tinsley were decided before the 1998 amendment to section 7430(c)(1)(B)(iii), the outcome of these cases would not change due to the amendment which essentially incorporated the factors considered in those cases into the Code.

When Congress creates a statutory cap for attorneys’ fees, only truly extraordinary circumstances justify an increase, lest the exception swallow the rule. Pierce v. Underwood, 487 U.S. 552 (1988) (arising under the Equal Access to Justice Act (EAJA), 28 U.S.C. sec. 2412(d) (1994), but relevant to section 7430 as well, e.g. Cozean v. Commissioner, 109 T.C. at 233, n9; Powers v. Commissioner, 43 F.3d 172, 183 (5<sup>th</sup> Cir. 1995)). The tax expertise of a taxpayer’s lawyer alone is not a special factor under section 7430(c)(1)(B)(iii). Cassuto v. Commissioner, 936 F.2d 736, 743 (2<sup>d</sup> Cir. 1991); Bode v. United States, 919 F.2d 1044, 1050 (5<sup>th</sup> Cir. 1990). Litigating this case did not require extraordinary skill or ability. Instead, the case presented a straightforward legal question where the Service’s position was clear from prior litigation and subsequent announcement of position, as well as readily ascertainable by taxpayers’ counsel through ordinary legal research. The lower court’s award of attorney’s fees in excess of the statutory cap under section 7430, in the absence of special factors, as set forth in the applicable Treasury Regulation, was incorrect as a matter of law.

**Recommendation:** Nonacquiescence.

**Reviewers:** CGW  
BGD  
DAB  
EAP

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