

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-210706

DATE: July 5, 1984

MATTER OF: Source of funds for payment of awards under
26 U.S.C. § 7430

DIGEST:

1. The permanent indefinite appropriation established by 31 U.S.C. § 1304 is available to pay litigation cost awards made by Federal district courts and United States Claims Court under the authority of 26 U.S.C. § 7430. The judgment appropriation is generally available for the payment of court awards unless payment is otherwise provided for, and there is nothing in the language or legislative history of 26 U.S.C. § 7430 to make agency funds available to pay awards authorized by that section.
2. Although 26 U.S.C. § 7430 authorizes litigation cost awards by the United States Tax Court, no appropriation is currently available to satisfy such awards. The legislative history of 26 U.S.C. § 7430 suggests that Congress did not intend that agency funds be used to pay such awards, and the permanent indefinite appropriation established by 31 U.S.C. § 1304 is not available to pay the awards because section 1304 does not apply to the Tax Court.

The Assistant Secretary for Administration of the Department of the Treasury has asked whether the permanent, indefinite judgment appropriation established by 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) is available to satisfy litigation cost awards against the Internal Revenue Service (IRS) made under 26 U.S.C. § 7430 (I.R.C. § 7430). We hold that the judgment appropriation is the proper payment source of section 7430 awards made by the Federal district courts and the United States Claims Court, but not by the Tax Court. As explained below, no appropriation is currently available to satisfy section 7430 awards made in Tax Court cases.

Background

Prior to 1976, except for certain limited types of court costs authorized by 28 U.S.C. § 2412(a), there was no authority to award attorney fees or other litigation expenses against the United States in civil tax cases. In

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1976, Congress authorized the courts to award reasonable attorney fees to the prevailing party, other than the United States, in actions brought by or on behalf of the United States "to enforce, or charging a violation of, a provision of the United States Internal Revenue Code." 42 U.S.C. § 1988 (1976). Fee awards against the United States in tax cases authorized by 42 U.S.C. § 1988 were paid from the permanent judgment appropriation. B-158810, February 22, 1977.

In 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, title II, 94 Stat. 2325, extensively revising 28 U.S.C. § 2412 to authorize judicial awards of attorney fees in certain situations in which they were not previously authorized. Since it was intended that fee awards in civil tax cases be included under the new 28 U.S.C. § 2412(d),^{1/} EAJA § 205(c), 94 Stat. 2330, repealed that portion of 42 U.S.C. § 1988 authorizing awards in tax cases. However, the EAJA fee awards provisions were not viewed as applying to cases in the United States Tax Court.^{2/} Furthermore, awards under 28 U.S.C. § 2412(d) may not be paid from the permanent judgment appropriation, but must be paid from agency funds. 62 Comp. Gen. 692 (1983).

In 1982, Congress again dealt with fee awards in tax cases by enacting section 292 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248 (September 3, 1982), 96 Stat. 572. Section 292 added a new section 7430 to the Internal Revenue Code, which provides in general that courts in their discretion may award reasonable litigation costs to taxpayers who prevail in civil tax cases upon a showing that the position of the United States is unreasonable. I.R.C. § 7430(a), (c)(2). Litigation costs include court costs, expert witness fees, costs of studies and reports and attorney's fees. I.R.C. § 7430(c)(1)(A).

Aware that the EAJA does not apply to the Tax Court, Congress enacted section 7430 because it believed that taxpayers should be able to recover litigation costs in all tax

^{1/} S. Rep. No. 96-253, page 22 (1979); H.R. Rep. No. 96-1418, page 19 (1980).

^{2/} H.R. Rep. No. 97-404, page 10 (1981).

cases, not just those heard in district courts and the Claims Court. It was concerned that since most tax litigation occurred in the Tax Court, relatively few taxpayers would be able to recover litigation costs without a legislative change. Further, the Congress believed that one set of rules should apply to awards of litigation costs in tax cases whether the action is brought in district court, the Claims Court or the Tax Court. H.R. Rep. No. 97-404, at 11 (1981). To further accomplish its objective of a uniform scheme for fee awards in tax cases, Congress made the new section 7430 the exclusive provision for such awards by amending 28 U.S.C. § 2412 to remove tax cases from the scope of the EAJA. Pub. L. No. 97-248, § 292(c) 96 Stat. 574.

As do portions of the EAJA, the new I.R.C. § 7430 has a "sunset date," and without further congressional action, will not apply to proceedings commenced after December 31, 1985.

The permanent judgment appropriation is generally available to pay final judgments and compromise settlements against the United States in Federal district court cases and U.S. Claims Court cases and in certain other cases not relevant here, as long as "payment is not otherwise provided for." 31 U.S.C. § 1304(a)(1). Stated another way, if some appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment or award, then the judgment appropriation is not available to pay it. The Assistant Secretary requested this decision because the Department is in doubt as to whether section 7430 authorizes the payment of awards from agency funds.

Availability of agency appropriations

The starting point is the long-standing rule that, except for certain situations not relevant here (for example, Government corporations and certain "sue and be sued" agencies), an agency's operating appropriations are not available to pay judgments unless provided for by statute. E.g., 27 Comp. Dec. 262 (1920); 15 Comp. Gen. 933 (1936).

Under the Equal Access to Justice Act, agency appropriations are available to pay awards under 28 U.S.C. § 2412(b) if based on a finding that the United States acted in bad faith, and awards under 28 U.S.C. § 2412(d). 62 Comp. Gen. 692 (1983); B-40342.3, March 19, 1984. However, the payment provisions of the Equal Access to Justice Act were not carried forward into the new section 7430. We have found nothing in the language or legislative history of

section 7430 to make the operating appropriations of the IRS available to pay the awards in question.

Moreover, we note that at least four unenacted bills very similar to section 7430 which Congress had before it at the time it was considering section 7430 contained an express provision that agency funds should be used to pay "litigation cost" awards. S. 752, 97th Cong., 1st Sess. § 2 (1981); S. 1673, 97th Cong., 1st Sess. § 2 (1981); S. 1673, 97th Cong., 1st Sess. § 2 (1981); H.R. 3262, 97th Cong., 1st Sess. § 2 (1981); H.R. 4857, 97th Cong., 1st Sess. § 2 (1981). Each of these bills would also have created a new section 7430, and each included an additional subparagraph (g) which reads as follows:

"(g) Source of Payment.--Payment of any award for reasonable court costs under subsection (a) shall be made by the agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose."

This payment provision was not included in the enacted version of section 7430. Since we could find no mention of the reasons for deleting it, its effect in terms of legislative intent must be viewed as inconclusive. Nevertheless, it is of some relevance that if Congress had wished to expose IRS operating appropriations, it had language before it to accomplish that purpose.

Availability of the permanent judgment appropriation

The permanent judgment appropriation, 31 U.S.C. § 1304, provides in pertinent part as follows:

"(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when--

- (1) payment is not otherwise provided for;
- (2) payment is certified by the Comptroller General; and
- (3) the judgment, award, or settlement is payable--
 - (A) under section 2414, 2517, 2672, or 2677 of title 28;
 - (B) under section 3723 of this title;
 - (C) under a decision of a board of contract appeals; or
 - (D) in excess of an amount payable from the appropriations of an agency for

a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473)."

The statute specifically enumerates the items for which it is available. Judgments by United States district courts are expressly included (28 U.S.C. § 2414), as are judgments by the United States Claims Court (28 U.S.C. § 2517). Thus, since we have determined that they are not otherwise provided for, awards under section 7430 made by a district court or by the Claims Court may, upon becoming final, be certified for payment from the judgment appropriation. B-158810, February 22, 1977.

However, 31 U.S.C. § 1304 nowhere mentions the Tax Court, and has in fact never been available for Tax Court proceedings. Thus, the judgment appropriation by its terms does not apply to Tax Court awards, and therefore may not be used for their payment unless made available by some other statute. Again, we have reviewed the language and legislative history of TEFRA and find no mention of the actual payment of Tax Court awards.

An appropriation of funds from the Treasury cannot be inferred. It must be explicitly stated. This is required by 31 U.S.C. § 1301(d) (formerly 31 U.S.C. § 627), which provides that a statute may be construed as making an appropriation only if it expressly so states. While the statute does not necessarily have to be in the form of a traditional "appropriation act," it must nevertheless be specific. B-114808, August 7, 1979. Therefore, since TEFRA merely authorizes the making of the awards and does not make provision for their payment, and since there has been no corresponding amendment to 31 U.S.C. § 1304, we must conclude that TEFRA does not independently appropriate funds for payment of the awards, nor does it make the permanent judgment appropriation available for their payment.


Conclusions

In view of the foregoing, operating appropriations of the IRS currently are not available to pay "litigation cost" awards made under the authority of 26 U.S.C. § 7430. Such awards, if made by a United States district court or the United States Claims Court may be certified for payment from the permanent judgment appropriation (31 U.S.C. § 1304). However, the judgment appropriation is not available to pay "section 7430 awards" made by the United States Tax Court.

Although the Congress has authorized the payment of litigation costs in Tax Court cases by enacting section 7430, as yet no funds have been appropriated for this purpose. Accordingly, to perfect the section's purpose we recommend that the IRS request specific congressional appropriations to cover the litigation costs awards which the Tax Court has made against it since section 7430 was enacted. In the alternative, we note that Congress could amend section 7430 so as to make the permanent judgment appropriation available by adding a new subsection, subsection "(g)" which could provide:

"Awards for reasonable litigation costs under subsection (a) made by the Tax Court shall be paid from the appropriation made under section 1304 of title 31."

Under this alternative approach the source of funds for the payment of Tax Court awards would be the same as for district court and United States Claims Court awards.

for 
Comptroller General
of the United States