

**Making the IRS a Qualified Offer it Can't Refuse:
Using qualified offers to help settle tax cases and obtain reimbursement of costs.¹**

Eric L. Green, Esq.²

One of the most under-utilized weapons in the practitioner's arsenal is the Qualified Offer under Internal Revenue Code ("IRC") § 7430. By making a Qualified Offer to the IRS, the practitioner raises the stakes for the government because it puts the issue of obtaining reimbursement for the taxpayer's costs and fees front and center for the government. It is the author's experience that when a qualified offer is made it has the effect of sharpening minds on the side of the Government and may have the effect of persuading the government to seriously consider your client's arguments and settle the case.

The Recovery of Fees and Costs

In any administrative or court case brought against the United States, IRC § 7430 allows a taxpayer to recover reasonable administrative and litigation costs provided:

- The costs are associated with the determination;
- The taxpayer exhausted their administrative remedies;
- The costs incurred by the taxpayer are only those associated with the United States and not another third party;
- The taxpayer did not protract the proceeding; and
- The taxpayer is the prevailing party.

If the taxpayer meets these criteria they can recover their reasonable costs and fees, including litigation costs and administrative fees. Attorney's fees are limited by IRC § 7430(c)(1)(B)(iii) and adjusted for inflation. Currently taxpayers may recover \$180 per hour for attorney's fees in 2010.³

Exhaustion of Administrative Remedies

In order for a taxpayer to recover their costs they are required under IRC § 7430(b)(1) to "exhaust administrative remedies." This means that the taxpayer either requested and had a conference with the IRS Appeals Division or, if the taxpayer did not receive their 30 day letter prior to the Final Determination letter, they agree to participate in an appeals hearing.⁴

¹ This article was originally published in CCH's Journal of Tax Practice & Procedure, April-May 2010.

² Eric L. Green is a partner at Convicer, Percy & Green, LLP in Glastonbury, Connecticut and Newton, Massachusetts.

³ Rev. Proc. 2009-50.

⁴ Reg § 301.7430-1

Who is the Prevailing Party?

A taxpayer is required under IRC § 7430(a) to establish that he or she is the prevailing party to recover costs and fees. In order to establish this the taxpayer must prove:

- That he or she substantially prevailed in the proceeding with respect to the amount in controversy or the most significant issues;
- The taxpayer met the net worth requirements of IRC § 7430(c)(4)(a), currently \$2 million for individuals⁵; and
- The government does not establish that its position was substantially justified.

However, where a taxpayer makes a “Qualified Offer” that the IRS rejects and later wins a determination to pay less than the amount they had offered, the taxpayer will be considered to be the prevailing party.⁶

Qualified Offers

A “Qualified Offer” is an offer meeting the following criteria:⁷

1. The offer is written;
2. The offer is made by the taxpayer to the IRS during the “Qualified Offer Period”;
3. The offer specifies the amount of the taxpayer’s liability;
4. The offer is designated as a qualified offer under IRC § 7430(g); and
5. The offer remains open from the date it is made until the earlier of the following:
 - a. The offer is rejected;
 - b. The date the trial begins, or
 - c. The 90th day after the offer is made.

The Offer is required to be made during the “qualified offer period” which is the period of time that starts on the date of the proposed deficiency which allows the taxpayer an opportunity for administrative review with the IRS Office of Appeals and ends on the date which is 30 days before the trial is set to begin.⁸

Designation as a Qualified Offer: Ciccotelli v. US

A Qualified Offer must be delivered to the United States office with which they are working with: either the Office of Appeals, Office of Chief Counsel (if litigating in the United States

⁵ Regulation § 301.7430-5(f)(1)

⁶ IRC § 7430(c)(4)(E) and Regulation § 301.7430-7.

⁷ IRC § 7430(g)(1)

⁸ IRC § 7430(g)(2)

Tax Court) or the Department of Justice (if in refund litigation in Federal District Court) that has jurisdiction over the tax matter.⁹

Conclusion

Though the Internal Revenue Code allows taxpayers to recover fees from the government in certain circumstances after the fact, it also creates a tremendous tool for practitioners in allowing for qualified offers.

Frankly, knowing that a qualified offer will increase the pressure on the government to settle the matter, create the potential to recover fees after the case is resolved, while adding no additional risk for the taxpayer, one has to wonder why more practitioners do not utilize qualified offers more frequently.

⁹ Regulation § 301.7430-7(c)(2)