E. Roger Frisch and Marie L. Frisch v. Commissioner of Internal Revenue, 87 T.C. 838 (1986)

Under Section 7430 of the Internal Revenue Code, a pro se attorney who prevails in tax litigation against the IRS is not entitled to recover attorney's fees for the value of their own legal services, even if the IRS's position was unreasonable, although they may recover other litigation costs.

Summary

E. Roger Frisch, an attorney, represented himself and his wife in a Tax Court case contesting the IRS's valuation of a charitable contribution. After prevailing and demonstrating the IRS's position was unreasonable, Frisch sought litigation costs under Section 7430 of the Internal Revenue Code, including attorney's fees for his own time. The Tax Court determined the IRS's position was indeed unreasonable and awarded Frisch expert witness fees and court costs. However, the court denied Frisch's request for attorney's fees for his pro se representation, reasoning that Section 7430 does not authorize compensation for an attorney's own services when representing themselves, as such fees are not "paid or incurred".

Facts

Petitioners, E. Roger and Marie L. Frisch, donated a Norman Rockwell print to Bates College in December 1979 and claimed a charitable contribution deduction. They had purchased the print in 1974 for $1,150. The Commissioner of the IRS determined the print was worth only $500, resulting in a deficiency notice and a negligence penalty. Before trial in Tax Court, the IRS conceded an issue related to a mining partnership. The remaining issues—the charitable contribution deduction, negligence, and additional interest—depended on the valuation of the Rockwell print. The Tax Court ultimately ruled in favor of the Frisches regarding the valuation.

Procedural History

The case was tried in the U.S. Tax Court. The Tax Court initially issued an oral opinion and findings of fact in favor of the petitioners. A decision was entered accordingly. Petitioners then moved for an award of litigation costs, including attorney's fees for E. Roger Frisch's pro se representation. The Tax Court vacated its initial decision to consider the motion for litigation costs. The court then ruled on the motion, awarding some costs but denying attorney's fees for pro se representation.

Issue(s)

1. Whether the position of the IRS in the civil tax proceeding was unreasonable, thus entitling the prevailing party to litigation costs under Section 7430 of the Internal Revenue Code.

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2. Whether Section 7430 of the Internal Revenue Code permits a pro se attorney-petitioner to recover attorney's fees for the value of their own legal services rendered in their own behalf.

Holding

1. Yes, because the IRS relied on a thoroughly discredited appraisal, failed to adequately investigate, and maintained an inflexible and unreasonable position throughout the litigation.
2. No, because Section 7430, which allows for "reasonable fees paid or incurred for the services of attorneys," does not extend to compensating a pro se attorney for their own time and effort in representing themselves.

Court's Reasoning

The Tax Court reasoned that the IRS's position was unreasonable due to its reliance on a flawed appraisal of the donated print, which was demonstrably inaccurate and incomplete. The court noted that the IRS was alerted to the defects in its expert's report and should have investigated further, especially given the petitioner's appraisal. The court also criticized the IRS's inflexible stance and burdensome interrogatories, concluding that the IRS employed a strategy to force the petitioner to capitulate regardless of the merits, which legislative history indicates is a factor of unreasonableness under Section 7430.

Regarding attorney's fees for pro se representation, the court analyzed the language of Section 7430, which allows for "reasonable fees paid or incurred for the services of attorneys." The court adopted the dissenting opinion in *Duncan v. Poythress*, emphasizing that the term "attorney" inherently implies an agency relationship—acting for another. A pro se litigant, even an attorney, is acting for themselves, not for "another." Furthermore, the court interpreted "fees paid or incurred" to mean actual expenditures or liabilities to another party, not the opportunity cost of an attorney representing themselves. The legislative history of Section 7430 supports this narrow interpretation, focusing on expenses "actually incurred." The court distinguished Section 7430 from broader fee-shifting statutes like the Civil Rights Attorney's Fees Awards Act and the Freedom of Information Act, which have different statutory language and purposes.

Practical Implications

Frisch v. Commissioner establishes a clear precedent within the Tax Court that pro se attorneys, even when successful in challenging the IRS's position and proving it unreasonable, cannot recover attorney's fees for their own time under Section 7430. This case highlights the strict interpretation of "attorney's fees" under this specific statute, emphasizing the requirement that fees must be "paid or incurred." It serves as a crucial case for tax attorneys and pro se litigants in Tax Court, clarifying the limitations on recoverable litigation costs and emphasizing the importance of

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understanding the specific language of fee-shifting statutes. Later cases considering attorney fee awards in tax litigation must consider this precedent when pro se attorney litigants are involved.

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