## *Gantner v. Commissioner*, 92 T.C. 192 (1989)

For purposes of awarding litigation costs under Section 7430 of the Internal Revenue Code, the “position of the United States” is limited to actions taken by the IRS District Counsel and subsequent administrative or litigation positions, excluding pre-District Counsel actions.

### Summary

David and Sandra Gantner sought litigation costs after partially prevailing in a tax dispute with the Commissioner of Internal Revenue. The central issue was whether the Commissioner’s position in the litigation was “substantially justified,” a requirement for awarding costs under Section 7430 of the Internal Revenue Code. The Tax Court held that for proceedings commenced after 1985, the “position of the United States” only includes actions or inactions by the District Counsel of the IRS and subsequent actions. Because the court found the Commissioner’s position after District Counsel involvement to be substantially justified regarding the stock option issue, the Gantners’ motion for litigation costs was denied. The court clarified that pre-District Counsel actions, such as those of a revenue agent during an audit, are not considered when evaluating the substantial justification of the Commissioner’s position, even within the Eighth Circuit, distinguishing precedent cited by the Gantners.

### Facts

David and Sandra Gantner disputed various deductions and investment credits claimed on their tax returns, totaling $61,198.74 in deductions and $2,164.48 in investment credits. They also contested the appropriateness of increased interest related to previously conceded commodities straddles deductions. In a prior proceeding, the Tax Court ruled in favor of the Gantners on one significant issue, allowing a deduction of $38,909.70 for 1980 related to stock options. However, the court largely sided with the Commissioner on the remaining deductions and investment credits. Subsequently, the Gantners moved for litigation costs under Rule 231 and Section 7430, arguing that the Commissioner’s position was not substantially justified. The Commissioner opposed this motion, contending that their position was indeed substantially justified and that the claimed costs were unreasonable.

### Procedural History

The Gantners filed a petition in the United States Tax Court in January 1986. On September 29, 1988, the Tax Court issued its opinion on the underlying tax issues, ruling partially in favor of the Gantners. Following this, the Gantners filed a motion for litigation costs pursuant to Rule 231 and Section 7430 of the Internal Revenue Code. This opinion addresses the Gantners’ motion for litigation costs.

 

**Issue(s)**

1. Whether, for the purpose of awarding litigation costs under 26 U.S.C. § 7430, "the position of the United States" includes actions or inactions by the Internal Revenue Service prior to the involvement of District Counsel.

2. Whether, if the "position of the United States" is limited to actions at or after District Counsel involvement, the Commissioner's position in this case was "substantially justified" subsequent to District Counsel's involvement.

**Holding**

1. No. The Tax Court held that under 26 U.S.C. § 7430(c)(4), the "position of the United States" in Tax Court proceedings only includes actions or inactions occurring at or after the point at which District Counsel of the IRS becomes involved.

2. Yes. The Tax Court held that the Commissioner's position regarding the stock option/wash sale issue, subsequent to District Counsel's involvement, was substantially justified because it was supported by a rational, though ultimately incorrect, construction of the applicable statutory provision.

**Court's Reasoning**

The Tax Court interpreted 26 U.S.C. § 7430(c)(4), which defines "position of the United States" to include "(B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administration action or inaction) upon which such proceeding is based." The court relied on its prior holdings in *Sher v. Commissioner*, 89 T.C. 79 (1987), and *Egan v. Commissioner*, 91 T.C. 704 (1988), which interpreted this section to limit the "position of the United States" to actions at or after District Counsel involvement. The court distinguished Eighth Circuit cases cited by the petitioners, *Wickert v. Commissioner*, 842 F.2d 1005 (8th Cir. 1988), and *Berks v. United States*, 860 F.2d 841 (8th Cir. 1988), noting that those cases involved petitions filed before 1986, and thus were not governed by the amended 26 U.S.C. § 7430(c)(4). The court stated, "We do not read the Eighth Circuit's comments in *Berks* and *Wickert* to require our review of respondent's activities prior to District Counsel's involvement." The court also found support in the legislative history of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), which amended Section 7430, indicating that prior law, applicable in this case, generally did not include positions taken in the audit or appeals processes as part of the "position of the United States." Regarding substantial justification, the court found that the Commissioner's position on whether stock options were "securities" for purposes of 26 U.S.C. § 1091 (the wash sale rule) was substantially justified. The court noted, "We find respondent's arguments and asserted statutory construction to have been rational and sound, but in our opinion, incorrect. The fact that respondent ultimately was unsuccessful at litigation alone is insufficient to render his position not substantially justified…"

**Practical Implications**

*Gantner v. Commissioner* is a key case for understanding the scope of "position of the United States" when taxpayers seek to recover litigation costs from the IRS under 26 U.S.C. § 7430 in Tax Court. It establishes a clear demarcation: only actions and inactions from the point of District Counsel involvement onward are considered when determining whether the IRS's position was substantially justified. This means that taxpayers cannot rely on pre-District Counsel conduct, such as actions during an audit by a revenue agent, to demonstrate that the IRS's position was not substantially justified, even if those earlier actions might seem unreasonable. The case highlights the importance of understanding the specific statutory definition of "position of the United States" in Section 7430 and its implications for recovering costs in tax litigation. It also demonstrates the Tax Court's interpretation of its jurisdiction and its adherence to its own precedents, even when considering appellate court opinions, unless directly controlling under the *Golsen* rule. For tax practitioners, *Gantner* underscores the limited scope of review for pre-litigation IRS conduct when pursuing litigation costs and emphasizes focusing on the IRS's actions and positions taken after District Counsel becomes involved.

 