

NA 04-0190-C H/H Storage Office Systems v USA [3]  
Judge David F. Hamilton

Signed on 08/10/07

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

STORAGE AND OFFICE SYSTEMS, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. ) CASE NO. 4:04-cv-0190-DFH-WGH  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

ENTRY ON ATTORNEY FEE AND DAMAGE ISSUES

The court entered final judgment for plaintiff on March 30, 2007, and the United States has chosen not to appeal. See *Storage and and Office Systems, LLC v. United States*, 490 F. Supp. 2d 955 (S.D. Ind. 2007). Plaintiff has moved for an award of attorney fees and costs under 26 U.S.C. § 7430. Plaintiff has also moved for leave to amend its complaint after judgment to assert a claim for more than \$700,000 in damages under 26 U.S.C. §§ 7432 and 7433. The United States opposes both motions.

I. *Attorney Fees and Costs*

The Internal Revenue Code contains in 26 U.S.C. § 7430 an analog to the Equal Access to Justice Act, 28 U.S.C. § 2412. Section 7430 authorizes an award of attorneys fees and costs to the prevailing party in a court proceeding concerning

a tax dispute, subject to several conditions. See *Wilfong v. United States*, 991 F.2d 359, 364 (7th Cir. 1993) (reversing award of fees under § 7430). Plaintiff has now shown that it satisfied the net worth and number of employees criteria. Under section 7430(c)(4)(B)(i), a party who seems to have prevailed against the United States is not deemed a prevailing party “if the United States establishes that the position of the United States in the proceeding was substantially justified.” The disputed issues here are whether the position of the United States was “substantially justified,” and if not, whether plaintiff’s lead attorney should be compensated above the presumptive statutory hourly rates. See § 7430(c)(1)(B).

To be “substantially justified,” the position of the United States must have had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Barford v. Commissioner*, 194 F.3d 782, 786 (7th Cir. 1999); *Wilfong*, 991 F.2d at 364 (applying § 7430). The position must have been stronger than merely non-frivolous. *Pierce*, 487 U.S. at 565-66; *Barford*, 194 F.3d at 786. On the other hand, the government’s position need not have been correct. See *Wilfong*, 991 F.2d at 367 (government’s position was substantially justified, even though jury found in favor of tax return preparer); *Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996), quoting *Pierce*, 487 U.S. at 566 n.2. “Substantially justified” does not mean “justified to a high degree”; the standard is satisfied if there is a “genuine dispute,” or if reasonable persons could differ as to the appropriateness of the contested action. *Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992) (applying EAJA), citing *Pierce*, 487 U.S. at 565. Under the current language of

§ 7430, the burden is on the government to show that its position was substantially justified.

The position of the United States in this case was not substantially justified. As the court explained in its ruling on the parties' motions for summary judgment, the issues in this case are squarely controlled by a specific and detailed statute, 26 U.S.C. § 6323(a), which protects purchasers of businesses from unfiled tax liens. 490 F. Supp. 2d at 960-62. Where the issue is governed by such a statute, it is difficult to see why the government might have been justified in looking further. Nevertheless, recognizing that it would lose under the controlling statute, the government attempted to stretch the common law doctrine of successor liability that has been applied in some labor and employment cases. See *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) (applying theory to withdrawal liability for multi-employer pension fund). The government offered only "meager" support for extending this theory to the priority of tax liens, which are already governed by a specific and detailed statute. 490 F. Supp. 2d at 962. Without repeating the court's earlier analysis of the offered support, the government provided no plausible basis for avoiding the specific provisions of the governing statute. The government offered no case law applying a common law theory of successor liability to enforce a later-filed federal tax lien against a taxpayer who qualified as a "purchaser" within the meaning of 26 U.S.C. § 6323.

The government suggests that its position was substantially justified because the government presented a case of first impression as it tried to substitute the doctrine of successor liability for the statutory provisions on lien priority in section 6323. The government did not brief the case on the merits as if it were a case of first impression. In any event, the fact that no other court had previously had the opportunity to reject this weak theory for avoiding the effect of the controlling statute does not mean the position was substantially justified. The government's position in this case was not so frivolous as to justify sanctions under Rule 11 of the Federal Rules of Civil Procedure, but it did not clear that low bar with much room to spare. Plaintiff is entitled to an award of attorney fees and costs under 26 U.S.C. § 7430.

Plaintiff has come forward with its attorneys' billing records and other expenses. The disputed issue is whether attorney James Martin's time should be compensated at the presumptive statutory rates under section 7430, or whether the court should award a higher rate based on a finding that "a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise" justifies a higher rate. 26 U.S.C. § 7430(c)(1)(B)(iii). The Supreme Court interpreted a similar rate cap and exception in *Pierce v. Underwood*, 487 U.S. at 571-74. To preserve the effectiveness of the statutory cap, the Supreme Court held that the district court had abused its discretion by awarding a higher rate based on prevailing market rates and other broadly applicable

factors, such as the novelty and difficulty of the issues, the results obtained, and the contingent nature of the fee.

The court recognizes that Mr. Martin has substantial experience and expertise in tax law and collection matters, and that the market rate for his services is well above the statutory rate. In enacting legislation that would require other taxpayers to pay for one taxpayer's legal fees, however, Congress chose to impose a statutory cap on reasonable rates. Congress could reasonably anticipate that any litigation subject to section 7430 would involve lawyers with experience and expertise in tax law. See, *e.g.*, *Powers v. Commissioner*, 43 F.3d 172, 183-84 (5th Cir. 1995) (explaining that if attorney's specialization in tax law were a "special factor" justifying higher rate under § 7430, which applies only in tax cases, the exception would swallow the rule). Congress also chose to impose a statutory cap that could easily be below local market rates for lawyers with comparable expertise and experience. Plaintiff has not shown in this case that any special factors would justify an exception to the applicable statutory rates. In light of that ruling, plaintiff is entitled to a total of \$32,330.46 in attorney fees and costs, based on both its original and supplemental fee requests.

## II. *Damages Under 26 U.S.C. §§ 7432 and 7433*

Section 7432(a) of the Internal Revenue Code provides that a taxpayer may bring a civil action for damages against the United States if an officer or employee

of the Internal Revenue Service “knowingly, or by reason of negligence,” fails to release a lien under section 6325 on property of the taxpayer. Section 7433(a) provides that a taxpayer may bring such an action for damages if an officer or employee of the Internal Revenue Service “recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title.” After winning a final judgment in its favor in this case, plaintiff moved for leave to amend its complaint to add a claim for damages under sections 7432 and 7433. Plaintiff’s motion contends that the government’s pursuit of the case essentially caused plaintiff to close its doors, inflicting losses in excess of \$700,000.

The government has pointed out that a plaintiff must first exhaust available administrative remedies before seeking a judgment for damages. 26 U.S.C. §§ 7432(d)(1) and 7433(d)(1). Under the applicable regulations, an administrative claim must set forth the dollar amount of the claim and must describe the injuries incurred by the taxpayer. 26 C.F.R. §§ 301.7432-1(f)(2) and 301.7433-1(e)(2). The letter of April 23, 2004, which plaintiff has submitted as proof that it has exhausted administrative remedies, does not include either a claim for a dollar amount or a description of the injuries plaintiff claims. Accordingly, plaintiff has not shown that it has exhausted available administrative remedies. Its motion to amend its complaint is therefore denied without prejudice.

The court will enter a judgment awarding plaintiff its attorney fees and costs. If plaintiff eventually exhausts its administrative remedies on any damages claim under sections 7432 or 7433, it should file a new civil action. This matter will be closed in this court.

So ordered.

Date: August 10, 2007

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

Copies to:

Jeffrey L. Hunter  
UNITED STATES ATTORNEY'S OFFICE  
jeff.hunter@usdoj.gov

Stephen F. Schuster  
OGDEN NEWELL & WELCH  
1700 PNC Plaza  
Suite 1700  
Louisville, KY 40202

Douglas William Snoeyenbos  
DEPARTMENT OF JUSTICE, TAX DIVISION  
douglas.w.snoeyenbos@usdoj.gov

Thomas M. Williams  
STOLL KEENON OGDEN PLLC  
tom.williams@skofirm.com