

[26 C.F.R. § 301.7430-2]: [Requirements and procedures for recovery of reasonable administrative costs]
(Also: Section 7430)

Rev. Proc. 2016-17

SECTION 1. PURPOSE

This revenue procedure provides guidance on the recovery of administrative and litigation costs in connection with the determination, collection, or refund of any tax, interest, or penalty by individuals who provide pro bono representation to taxpayers.

SECTION 2. BACKGROUND

.01 Section 7430 provides for awards of reasonable administrative and litigation costs incurred by taxpayers who substantially prevail in administrative or court proceedings brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under title 26.

.02 Section 7430(c)(3)(B), as amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (Jul. 22, 1998) (RRA '98), provides that a court may award reasonable attorneys' fees under section 7430(a) in excess of fees paid or incurred if those fees are less than the

reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which, taking into account all the facts and circumstances, is no more than a nominal fee (i.e., pro bono).

.03 Section 7430(c)(3)(A) provides that the fees for the services of an individual (whether or not an attorney) who is authorized to practice before the United States Tax Court or before the Internal Revenue Service (the Service) shall be treated as fees for the services of an attorney.

.04 Section 7430(c)(3)(B) further provides that an award of fees for representation on a pro bono basis may only be paid to the individual providing the pro bono representation or such individual's employer.

.05 On November 25, 2009, the Treasury Department and the Service published proposed amendments to the Treasury regulations relating to awards of administrative costs and attorneys' fees under section 7430 (74 FR 61589) to conform the regulations to the amendments that were made to section 7430 in RRA '98, including the amendment allowing for an award of reasonable attorneys' fees when a taxpayer is represented on a pro bono basis. Final regulations are being issued contemporaneously with this revenue procedure (Treasury Decision 9756).

.06 In response to public comments received on the proposed regulations, this revenue procedure supplements the final regulations by providing more detailed information and processes specific to pro bono representation. A summary of the comments can be found in the preamble to the final section 7430 regulations.

SECTION 3. SCOPE

.01 This revenue procedure applies to representatives providing pro bono representation.

.02 Pro Bono Representation. Pro bono representation is established by demonstrating that (1) representation was provided for no fee or for a fee that, taking into account all the facts and circumstances, constitutes a nominal fee, and (2) the representative intended to provide representation for no fee or a nominal fee from the commencement of the representation. See Treas. Reg. § 301.7430-4(d)(2).

(A) A nominal fee is defined as a fee that is insignificantly small or minimal. A nominal fee is a trivial payment, bearing no relation to the value of the representation provided, taking into account all the facts and circumstances. See Treas. Reg. Sec. 301.7430-4(d)(3).

(B) Intent to provide representation for no fee or a nominal fee may be demonstrated through documentation such as a retainer agreement or a pro bono representation agreement. A representative will not be considered to have provided pro bono representation if the facts demonstrate that the representative anticipated a fee greater than a nominal fee or provided representation on a contingency fee basis. However, the fact that the representative intended to seek recovery of fees under section 7430 will not prevent the representative from satisfying this requirement. See Treas. Reg. § 301.7430-4(d)(2)(ii).

.03 Pro bono representatives include, but are not limited to, individuals providing pro bono representation directly or individuals employed by or acting in conjunction with

organizations providing legal representation. Thus, a pro bono representative may be a sole practitioner, a partner or employee in a law firm or accounting firm, an employee of an organization, or a volunteer affiliated with an organization. Examples of organizations that provide pro bono representation, in whole or in part, include, but are not limited to, legal aid organizations, low income taxpayer clinics receiving funding under section 7526, clinics participating in the Service's Student Tax Clinic Program, and clinics participating in the United States Tax Court's clinical program, whether the representation is provided by the employees, the legal aid organization or clinic, or by other individuals and/or service providers affiliated with the legal aid organization or clinic.

SECTION 4. PROCEDURE

.01 To recover fees under section 7430, a pro bono representative generally should follow the procedures set forth in section 7430, Treas. Reg. § 301.7430-2, and Tax Court Rules 230-233. The additional procedures set forth below apply only to pro bono representatives.

.02 Recordkeeping Requirements. To recover fees, a pro bono representative must maintain contemporaneous activity records of all time spent on a case for which fees are being claimed. The records should be similar to billing records maintained by for-profit law firms for non-pro bono representation, and must show the work performed and the time allocated to each task. The representation must be described in sufficient detail to enable the Service to evaluate the reasonableness of the amount of time expended in relation to the service performed and to identify duplicated efforts, if any.

The records must include time spent by all those who provide representation to the taxpayer that is recoverable under this revenue procedure. For each representative for whom fees are claimed, the records must identify the individual's name and position, such as supervisory attorney, student, or paralegal, and the associated incremental periods of time spent by that individual for which a fee is claimed. For each increment of time for which fees are claimed, the records must identify the date on which the representation was provided and must describe the nature of the representation in detail. The use of classifications to describe the representation is strongly encouraged. Suggested classifications include, but are not limited to, initial client interview, research (identifying the issue), preparing pleadings or other court documents, preparing letters (identifying the recipient and subject matter), investigation of underlying facts (briefly describing the subject matter and information), analysis of taxpayer or third-party records (identifying the records), consultation with tax return preparer (identifying the preparer), consultation or interview of third party (identifying the person), and telephone conversations (identifying with whom the conversation was held and the subject matter). What constitutes sufficient detail will be initially determined by the Service based on the facts and circumstances of each case.

.03 Review of Denial. The Service's denial of an award of fees, in whole or in part, may be challenged in the Tax Court pursuant to section 7430(f).

.04 Rate for Pro Bono Representatives Who Charge an Hourly Rate. The hourly rate used to calculate an attorney fee award for pro bono representatives who charge hourly rates in their ordinary course of business will generally be limited to the lesser of

the statutory hourly rate set forth in section 7430(c)(1)(B)(iii) or their hourly billing rate, unless they can establish that a special factor, as described in section 7430(c)(1)(B)(iii), applies.

.05 Fixed Rate for Pro Bono Representatives Who Do Not Charge an Hourly Rate.

Some pro bono representatives do not charge hourly rates for representation in the ordinary course of their business. Examples of these pro bono representatives include, but are not limited to, employees of a clinic or organization that provides pro bono representation, and other individuals who perform pro bono representation outside of their professional employment, such as retired representatives or in-house counsel. Since it is often difficult to determine an appropriate hourly rate with respect to these pro bono representatives on a case-by-case basis, and attempting to do so may require the expenditure of significant resources by the parties to the proceeding and possibly a court, this revenue procedure provides a fixed rate for individuals who provide pro bono representation but do not charge an hourly rate for representing taxpayers equal to the statutory hourly rate under section 7430(c)(1)(B)(iii). If an award based on a higher hourly rate is sought, the burden will be on the requester to establish that a higher hourly rate is appropriate.

.06 Fixed Rate for Students and Paralegals. Reasonable fees may be recovered for work performed by students who have been authorized to practice before the Service pursuant to 31 C.F.R. Part 10 (Treasury Department Circular No. 230) or to practice before the United States Tax Court under the supervision of a practitioner through the United States Tax Court's Clinical, Student Practice and Calendar Call Program, and by

paralegals or other persons qualified to perform paralegal work who are assisting pro bono representatives. For reasons similar to those described in section 4.05 of this revenue procedure, this revenue procedure provides a fixed rate for students authorized as described in this section 4.06, and for paralegals or other persons qualified to perform paralegal work regardless of whether they charge an hourly rate, equal to thirty-five percent of the statutory hourly rate provided for representatives under section 7430(c)(1)(B)(iii). If an award based on a higher hourly rate is sought, the burden will be on the requester to establish that a higher hourly rate is appropriate. Fees are not recoverable for work that is secretarial in nature. See Treas. Reg. § 301.7430-4(c)(2).

.07 Other Volunteers at a Pro Bono Clinic or Organization. Fees for time claimed for other volunteers (e.g., students or professionals who have not been authorized to practice before the Service or the Tax Court or paralegal students) working at a pro bono clinic or organization may be recoverable on a case-by-case basis. The burden will be on the requester to establish an appropriate hourly rate.

.08 Application of Requirements of Section 7430. To be eligible for an award of attorneys' fees, taxpayers represented by a pro bono representative must meet all applicable requirements of section 7430.

.09 Award of Fees. A fee awarded under section 7430(c)(3)(B) generally will be paid to the pro bono representative, unless the Service is specifically instructed by the representative, in writing, to pay the fee to the representative's employer, such as a law firm. Fees awarded for services provided by an employee of a pro bono clinic or organization, or a student affiliated with a pro bono clinic or organization, will be paid to

the clinic or organization. If, however, an individual representative who is not an employee of a pro bono clinic or organization volunteers to provide services in affiliation with a pro bono clinic or organization, fee awards in that context will be paid to the clinic or organization. Solely for the purpose of determining to whom an award of fees under section 7430 should be paid, the clinic or organization will be considered the employer of the individual who volunteers to provide services for the pro bono clinic or organization. If the Service is specifically informed in writing by the pro bono clinic or organization that, pursuant to an agreement between the clinic or organization and the representative, some or all of the award should be paid to the representative or to the representative's employer, that agreement will be honored. For purposes of this section 4.09, a for-profit law firm is not considered to be an organization.

SECTION 5. EXAMPLES

Example 1. This example primarily illustrates the application of sections 4.04 and 4.05 of this Revenue Procedure. Attorney W, an employee of a low income taxpayer clinic, represents D in a Tax Court proceeding. Counsel, an attorney employed by a for-profit law firm, also represents D in that Tax Court action on a pro bono basis. D prevails and a motion for fees is filed on D's behalf. Counsel's hourly billing rate at the law firm exceeds the statutory hourly rate under section 7430(c)(1)(B)(iii). The claim for fees includes time charged at the statutory hourly rate for Attorney W and time charged at Counsel's hourly billing rate. Counsel cannot demonstrate that any special factor warrants an hourly rate in excess of the statutory hourly rate. Similarly, Attorney W cannot demonstrate that a rate in excess of the fixed rate is appropriate. Assuming D

meets the remaining requirements of section 7430, Attorney W and Counsel are entitled to an award of fees for a reasonable number of hours. The award is limited to the statutory hourly rate for Attorney W's and Counsel's time.

Example 2. This example primarily illustrates the application of sections 4.05 and 4.06 of this Revenue Procedure. Attorney X, an employee of a low income taxpayer clinic, represents A on a pro bono basis in a controversy with the Service. Student S and Paralegal P assist Attorney X with the representation of A. Student S has been authorized to practice before the Service. A prevails and Attorney X files a claim for fees on A's behalf. Attorney X does not charge an hourly billing rate, and cannot demonstrate that a rate in excess of the statutory hourly rate is appropriate. Similarly, Student S and Paralegal P do not charge an hourly billing rate, and cannot demonstrate that a rate in excess of the fixed rate set forth in section 4.06 of this revenue procedure is appropriate. Assuming A meets the remaining requirements of section 7430, fees will be awarded for Attorney X's reasonable time at a fixed rate equal to the statutory hourly rate under section 7430(c)(1)(B)(iii). Fees for reasonable time spent by Student S and Paralegal P in assisting Attorney X will be awarded at a fixed rate of thirty-five percent of the statutory hourly rate provided for representatives under section 7430(c)(1)(B)(iii).

Example 3. This example primarily illustrates the application of section 4.09 of this Revenue Procedure. Attorney Y, who is employed by a nonprofit organization, represents B on a pro bono basis. B prevails with respect to the amount in controversy. In addition to Attorney Y, B is represented by Lawyer, an attorney employed by a for-profit law firm, who worked on the case on a pro bono basis at the request of the

nonprofit organization. B prevails and Attorney Y files a claim for administrative and litigation costs on B's behalf. Therefore, assuming B is otherwise entitled to recover costs, and the nonprofit organization does not specifically inform the Service that the portion of the fees attributable to Lawyer's work on the case should be paid to Lawyer or Lawyer's firm, all fees will be paid to the nonprofit organization.

Example 4. This example primarily illustrates the application of section 4.02 of this Revenue Procedure. Attorney Z, an employee of a low income taxpayer clinic, provides C with pro bono representation in a controversy with the Service that was ongoing for several years. C prevails and Attorney Z files a claim for fees on C's behalf. The activity records submitted with the claim for fees were created shortly before the claim was submitted. The Service may challenge C's entitlement to fees based on the fact that the activity records were not contemporaneously maintained and may be unreliable.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for all motions for costs under section 7430 filed on or after February 29, 2016. Taxpayers may elect to follow this revenue procedure for motions for costs under section 7430 filed prior to February 29, 2016, and pending before the court on February 29, 2016.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Shannon K. Castañeda of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this revenue procedure, contact Shannon K. Castañeda at (202) 317-5437 (not a toll-free call).