

TAXPAYERS AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

In response to the United States Supreme Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*,¹ Congress has enacted legislation authorizing awards of attorney's fees in areas where such awards traditionally had been left to the discretion of the judiciary. The *Alyeska* decision held that the supposed equity power of the courts to award attorney's fees did not exist, and that courts could award such fees only where Congress expressly authorized them to do so.² One of the first congressional responses to this decision was the Civil Rights Attorney's Fees Awards Act of 1976 (Awards Act or Act).³ A portion of this statute authorizes the award of attorney's fees in certain cases arising under the Internal Revenue Code.⁴ The Act provides in pertinent part:

[I]n any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.⁵

Much debate has arisen with regard to whether this portion of the bill makes plaintiff as well as defendant taxpayers eligible for awards, and, once eligibility is established, what standard courts should use in deciding whether an award is justified.⁶

The tax portion of the Awards Act may have an important impact on the relationship between the Internal Revenue Service (IRS) and the taxpayer. As the tax collecting agency for the federal government, the IRS determines if, when, and how much of a taxpayer's finances the government can collect. Disagreement as to the timing of payments, amounts assessed, or methods used by the IRS to evaluate a taxpayer's resources can have a major monetary impact on the individual or business involved. To ensure fair and impartial resolution of such disputes, taxpayers must have access to the courts to protect their interests. Although taxpayers have always had the right to judicial

¹ 421 U.S. 240 (1975).

² The plaintiff in *Alyeska* sought attorney's fees under the "private attorney general" exception to the "American Rule." *Id.* at 271. Under the "American Rule," each party pays his or her own attorney's fees. Courts developed the exception to the rule to reimburse individuals who have brought lawsuits that vindicate important statutory or constitutional rights of all citizens. The Supreme Court decided in *Alyeska* that only Congress can create exceptions to the American Rule. *Id.*

³ 42 U.S.C. § 1988 (1976).

⁴ 26 U.S.C. § 1 *et seq.* (1976).

⁵ 42 U.S.C. § 1988 (1976).

⁶ See generally Ellentuck, Holub and Solomon, *Attorney's Fees Awards in Tax Litigation Now Available to Successful Litigants*, 46 J. TAX. 157 (1977); Comment, *Court Awarded Attorney's Fees in Tax Litigation*: 42 U.S.C. § 1988, 126 U. PA. L. REV. 1368 (1978); Comment, *The Civil Rights Attorney's Fees Awards Act of 1976, Key Buick & Aparacor: The Availability of Fee Awards to Prevailing Taxpayers and Standards for the Exercise of Judicial Discretion*, 31 TAX LAW. 855 (1978).

review of IRS action, in reality they cannot always exercise this right because of the great expense which it entails. The cost of bringing a dispute to court is often significantly greater than the amount of tax in dispute. Thus, many taxpayers find it impractical to seek court review of IRS action; as a result, wrongful or harassing IRS conduct may remain unchecked, and taxpayers are sometimes forced to pay taxes they do not legally owe.

The importance of the Awards Act is that it may remove this concern about attorney's fees from a taxpayer's decision whether to battle the IRS in court. If the Act can be read to authorize a court to award attorney's fees to *any* prevailing taxpayer, it would be a major step towards encouraging taxpayers to press their claims undeterred by the fear that theirs would be a pyrrhic victory. Unfortunately, the courts almost unanimously have limited the statute's application to situations where the taxpayer is the defendant in court, and can show some sort of IRS wrongdoing in bringing the suit against him.⁷

This note will first discuss the judicial response to the Internal Revenue Portion of the Awards Act by analyzing *Key Buick v. Commissioner*⁸ and *Patzkowski v. United States*,⁹ two examples of the typical judicial interpretation of the bill. Next, the legislative history of the Act will be considered in order to compare Congress' objectives with the judicial interpretation of the Statute. This comparison will focus on two principal areas of contention: whether the provision allowing attorney's fees in tax cases applies to prevailing plaintiffs as well as to prevailing defendants, and what standards are appropriate in determining whether a prevailing party should recover attorney's fees. The note will conclude with a discussion of the practical impact of the Awards Act under the limited interpretation which courts are presently giving to it, and will suggest the need for a broader bill allowing courts to award attorney's fees to both plaintiffs and defendants, with the same standard for recovery applicable to both.

I. JUDICIAL INTERPRETATION

Courts that have considered applying the Awards Act in tax litigation have been virtually unanimous in their reading of the statute. With one exception,¹⁰ every court has limited the award of attorney's fees to situations where the taxpayer is the defendant in the suit and can show wrongful conduct on the part of the government in bringing the action.¹¹ Moreover, in

⁷ See text and notes 10-35 *infra*.

⁸ 68 T.C. 178 (1977).

⁹ 576 F.2d 134 (8th Cir. 1978).

¹⁰ In *Levin v. United States*, 440 F. Supp. 8 (D. Mont. 1977), the court stated, with no explanation or reasoning, that "[t]he status of a party as a plaintiff or as a defendant is not relevant with respect to the award of attorney's fees pursuant to 42 U.S.C. § 1988 in a tax case or proceeding." 440 F. Supp. at 11.

¹¹ *Patzkowski v. United States*, 576 F.2d 134 (8th Cir. 1978); *In re Slodav*, 79-1 U.S. Tax Cas. ¶ 9215 (N.D. Ohio 1979); *Asher v. United States*, 78-2 U.S. Tax Cas. ¶ 9648 (N.D. Ill. 1978); *Better Beverages, Inc. v. United States*, 78-2 U.S. Tax Cas. ¶ 9644 (S.D. Tex. 1978); *Bryant v. United States*, 456 F. Supp. 174 (E.D. Pa.

only two cases have courts found both of these criteria satisfied and awarded attorney's fees under the Act.¹² In the rest of the cases, courts have refused to award fees either because the taxpayer was the plaintiff in the suit or because the taxpayer could show no wrongdoing on the government's part in bringing the action.

*Key Buick v. Commissioner*¹³ is typical of cases in which a court has considered whether the Act applies to prevailing plaintiffs as well as to prevailing taxpayer-defendants. *Key Buick* involved a petition for attorney's fees by a taxpayer who had prevailed in a suit brought by him in the Tax Court to protest the validity of an IRS deficiency notice. The Tax Court first considered the bill's statutory language and concluded that, on its face, the Act applies only to taxpayer-defendants.¹⁴ The court's opinion recognized that taxpayers are always plaintiffs in Tax Court, and since the bill only authorizes fee awards for suits brought "by or on behalf of the United States," taxpayers would never be eligible for attorney's fees in Tax Court.¹⁵ At the petitioner's request, the court then reviewed the legislative history of the bill, but came to the same conclusion. Recognizing that the provision relating to the Internal Revenue Code was a late amendment to the original bill,¹⁶ and hence not discussed in congressional committee reports, the court reviewed the floor debate concerning the amendment.¹⁷ To support its reading of the statute, the court cited a number of remarks by congressmen which expressly limit the bill's application to taxpayers who are defendants in court proceedings.¹⁸

1978); *Engel v. United States*, 448 F. Supp. 201 (W.D. Pa. 1978); *Holcomb v. United States*, 78 F.R.D. 527 (E.D. Wis. 1978); *In re Wrenn v. United States*, 78-1 U.S. Tax Cas. ¶ 9424 (W.D. Tenn. 1978); *Jacobsen v. United States*, 78-1 U.S. Tax Cas. ¶ 9323 (W.D. Tex. 1978); *Richman v. United States*, 447 F. Supp. 929 (N.D. Ill. 1978); *United States v. Goldman*, 453 F. Supp. 508 (C.D. Cal. 1978); *Chrome Plate, Inc. v. Dist. Director IRS*, 422 F. Supp. 1023 (W.D. Tex. 1977); *Ellis Sarasota Bank v. United States*, 40 A.F.T.R. 2d ¶ 77-6282 (M.D. Fla. 1977); *Haskin v. United States*, 444 F. Supp. 299 (C.D. Cal. 1977); *In re Kline*, 429 F. Supp. 1025 (D. Md. 1977); *Lieb v. United States*, 438 F. Supp. 1015 (E.D. Okla. 1977); *Schulken Bros. v. United States*, 77-2 U.S. Tax Cas. ¶ 9712 (C.D. Cal. 1977); *Star Oil, Inc. v. United States*, 41 A.F.T.R. 2d ¶ 78-388 (W.D. Okla. 1977); *United States v. Garrison Constr. Co.*, 77-2 U.S. Tax Cas. ¶ 9705 (N.D. Ala. 1977); *Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Cl. 1978); *Timken Co. v. United States*, 78-2 U.S. Tax Cas. ¶ 9653 (Ct. Cl. 1978); *VCA Corp. v. United States*, 77-2 U.S. Tax Cas. ¶ 9554 (Ct. Cl. 1977); *Key Buick Co. v. Comm'r*, 68 T.C. 178 (1977).

¹² *United States v. Garrison*, 77-2 U.S. Tax Cas. ¶ 9705 (N.D. Ala. 1977); *In re Slodav*, 79-1 U.S. Tax Cas. ¶ 9215 (N.D. Ohio 1979). See text and notes 74-86 *infra*.

¹³ 68 T.C. 178 (1977).

¹⁴ *Id.* at 179.

¹⁵ *Id.*

¹⁶ S. 2278, 94th Cong., 2d Sess. (1976) and H.R. 15,460, 94th Cong., 2d Sess. (1976).

¹⁷ 68 T.C. 178, 180. The full legislative debate on the amendment can be found at: 122 CONG. REC. S17049-53 (daily ed. Sept. 29, 1976); 122 CONG. REC. H12158-67 (daily ed. Oct. 1, 1976); 123 CONG. REC. S731-32 (daily ed. Jan. 14, 1977).

¹⁸ The court quoted from statements made by Senators Allen, Tunney, and Kennedy, all found at 122 CONG. REC. S17049-50 (daily ed. Sept. 29, 1976). See text at notes 43, 45-46 *infra*.

Arguing for a broader interpretation of the Act, the petitioner in *Key Buick* pointed instead to a statement by Senator Allen, the sponsor of the amendment, which suggests that the bill has a wider scope of application.¹⁹ The Senator maintained that the word "proceeding" in the statute covers administrative as well as court actions against the taxpayer.²⁰ Based on this remark, the petitioner argued that the bill applies to any taxpayer, plaintiff or defendant, whose participation in the suit is triggered by IRS administrative action, because such suits arise from "proceedings" brought by or on behalf of the United States. Since the IRS had precipitated this case by issuing a deficiency notice, the petitioner claimed that he was eligible for attorney's fees. The *Key Buick* court refused to give any weight to Senator Allen's statements, however, since they were made over three months after Congress had passed the bill and, hence, did not influence the legislators' thinking before they voted.²¹ The court found, therefore, that Senator Allen's statements were not indicative of congressional intent, and characterized his remarks as "only an expression of his opinion."²² The court then concluded that, in light of the *pre-vote* legislative history, "[t]here is nothing in the use of the word 'proceeding' . . . to indicate that the reference is to any proceeding other than a court proceeding."²³

In essence, the *Key Buick* court ruled that the courtroom stage of a taxpayer-IRS conflict is the critical point in determining whether an "action or proceeding" is brought "by or on behalf of the United States." Even though the IRS through its administrative processes initiates a dispute, a taxpayer is eligible for attorney's fees only if the IRS also initiates the courtroom battle. Thus, in *Key Buick*, the court denied attorney's fees to the petitioner because he had instituted the suit in Tax Court, even though the IRS initiated the dispute when it issued a deficiency notice. The court found that both the statute's language and history indicate that when the taxpayer is the plaintiff *in the litigation*, the Awards Act does not apply.²⁴

¹⁹ 68 T.C. at 182.

²⁰ 123 Cong. Rec. S731 (daily ed. Jan. 14, 1977). For excerpts from Senator Allen's statement, see text at note 50 *infra*.

²¹ 68 T.C. at 183.

²² *Id.*

²³ *Id.* at 184. The court briefly referred, in footnote 6 of its opinion, to cases that have interpreted the word "proceeding" in other statutes to include IRS administrative activities. It quickly dismissed these cases, however, as involving statutes "so different from the statute here involved as to be of little assistance." For a more detailed discussion of such cases, see text at notes 48-63 *infra*.

²⁴ 68 T.C. at 184. As a further ground for denying attorney's fees, the court observed that 42 U.S.C. § 1988 refers to the awarding of attorney's fees "as a part of the costs." *Id.* at 179. The court cited *Sharon v. Commissioner*, 66 T.C. 515, 533-34 (1976), *aff'd*, 78-2 U.S. Tax Cas. ¶ 9834 (9th Cir. 1978), for the proposition that it had no authority to award costs. The court in *Sharon* had decided that 28 U.S.C. § 2412 (authorization for "any court" to award costs) was inapplicable to the Tax Court, since Title 28 did not include the Tax Court in its definition of "court." 28 U.S.C. § 451 (1976). Thus, the court in *Key Buick*, reasoning that 42 U.S.C. § 1988 conditioned the authority to award attorney's fees on the authority to award costs, felt constrained not to award fees. 68 T.C. at 179.

Other courts, in considering requests for attorney's fees in refund suits, have adhered to *Key Buick's* reading of the Awards Act and have denied attorney's fees to plaintiff-taxpayers.²⁵ However, an important exception to this rule has developed. In *Patzkowski v. United States*,²⁶ the United States Court of Appeals for the Eighth Circuit held that a taxpayer in a refund suit is eligible for attorney's fees where the government has filed a counterclaim against him for additional funds. The court noted that the counterclaim plainly constituted an action "by or on behalf of the United States"; hence, the taxpayer was within the ambit of the Awards Act.²⁷ Although only one court since *Patzkowski* has considered and granted a request for attorney's fees under similar circumstances,²⁸ it appears that a governmental counterclaim will suffice to trigger application of the Act.

Once a court finds that a defendant-taxpayer, or a plaintiff-taxpayer faced with a counterclaim, is potentially eligible for attorney's fees, it must decide what standard it will use in deciding whether to award the fees. The court in *Patzkowski* thoroughly reviewed this question, and all courts that have subsequently considered application of the Awards Act have relied on its decision. As a starting point, the *Patzkowski* court noted that the language of the Act leaves to the court's discretion the decision whether to award fees.²⁹ The court recognized, however, that Congress did not mean to give the courts carte blanche discretion; rather, Congress "intended that the courts consider requests by prevailing defendants under [the Awards Act] pursuant to the standards developed in the already existent case law on awards of attorney's fees to prevailing defendants."³⁰

Recognizing that a large amount of decisional law on the awarding of attorney's fees has developed in the civil rights area, the *Patzkowski* court turned to those cases for guidance.³¹ It concluded that the standard for awarding attorney's fees to prevailing defendants in suits brought under Title VII of the Civil Rights Act of 1964,³² as recently enunciated by the Supreme

Whether or not this view is correct is beyond the scope of this note. It is suggested, however, that any future legislation relating to attorney's fees in tax cases should take into account the Tax Court's interpretation of 28 U.S.C. § 2412 and its effect on 42 U.S.C. § 1988.

²⁵ See note 11 *supra*.

²⁶ 576 F.2d 134 (8th Cir. 1978).

²⁷ *Id.* at 136.

²⁸ *Bryant v. United States*, 456 F. Supp. 174 (E.D. Pa. 1978). Although both *Patzkowski* and *Bryant* held the Awards Act applicable to government counterclaims, neither court had to decide how much, if any, it should award if the taxpayer ultimately prevailed. To the extent that the issues involved in the claim and counterclaim differ, an appropriate award should include only the costs of litigating those issues arising from the government's counterclaim. Thus, a possible area of dispute in future cases is the allocation of attorney's fees between amounts incurred by the taxpayer in defending against the counterclaim and amounts incurred in pursuing the claimed refund.

²⁹ 576 F.2d at 137.

³⁰ *Id.*

³¹ *Id.*

³² 42 U.S.C. § 2000e-5(k) (1976).

Court in *Christiansburg Garment Co. v. EEOC*,³³ is appropriate in awarding fees to prevailing taxpayer-defendants. Thus, the court held that:

[I]n proceedings where a prevailing taxpayer-defendant requests attorney's fees under § 1988, an award may be allowed when there is a showing that the Government's action was frivolous, harassing, vexatious, unreasonable, without foundation, or was instituted in bad faith. A showing of subjective bad faith on the Government's part is not, however, a *sine qua non* for an allowance of attorney's fees. It is merely one of several criteria which a district court should consider in exercising its discretion under the Act.³⁴

Since the district court in *Patzkowski* considered only whether the government had acted in bad faith, the circuit court remanded the case for reconsideration in light of all the criteria (*i.e.*, harassment, vexatiousness, unreasonableness, etc.) mentioned in its opinion.³⁵

As a result of decisions such as *Key Buick* and *Patzkowski*, courts have applied the Awards Act only when the taxpayer is the defendant in the suit and can show that the IRS acted unreasonably, vexatiously, frivolously, or in a bad faith or harassing manner. As *Key Buick* and *Patzkowski* illustrate, courts that have considered the scope of the Awards Act have relied heavily on legislative history to support their restrictive reading of the Act. A review of that history is thus necessary to determine if the courts' restrictions are appropriate.

II. LEGISLATIVE HISTORY

The legislative history of the Civil Rights Attorney's Fees Awards Act, as it relates to tax cases, is relatively scant. Both the Senate and House Judiciary Committees completed their reports³⁶ on the Act before the amendment granting attorney's fees in tax cases was introduced in Congress.³⁷ The only legislative history relating to the IRS portion of the bill consists of the floor debates over proposed amendments to the original bill.

Senator Allen of Alabama proposed the first tax-related amendment to the Act.³⁸ His proposal clearly applied only to defendant-taxpayers in suits brought by the IRS to assert a tax liability. It also expressly restricted the

³³ 434 U.S. 412 (1978).

³⁴ 576 F.2d at 139.

³⁵ *Id.*

³⁶ S. REP. NO. 1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908; H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976).

³⁷ The Senate Report was dated June 29, 1976, and the House Report was dated September 15, 1976. Discussion relating to the amendments concerning attorney's fees in tax cases commenced on September 22, 1976.

³⁸ The amendment read as follows: "Where suit is brought against any person asserting the existence of tax liability to the government on the part of such person and said suit is found in such action to be without merit or frivolous," attorney's fees may be awarded at the court's discretion. 122 CONG. REC. S16430 (daily ed. Sept. 22, 1976).

award of attorney's fees to frivolous or meritless suits.³⁹ Although the Senate defeated this proposal, the amendment is similar to the version later proposed by Senator Allen and ultimately adopted by Congress. Following Senator Allen's attempt to amend the original act (S. 2278), Senator Goldwater of Arizona proposed an amendment which would add a new section 6408 to the Internal Revenue Code.⁴⁰ Senator Goldwater's proposal permitted taxpayers to recover fees and costs only where they were subjected to second audits under frivolous or harassing conditions.⁴¹ This proposal differed from Senator Allen's proposal in three major ways. First, it applied to a taxpayer regardless of whether he was the plaintiff or defendant in court. Second, it covered the taxpayer's expenses in both administrative and courtroom proceedings. Third, the award was limited to one type of IRS harassment: second audits. This amendment, however, was also rejected by the Senate.

One week later, Senator Allen made the proposal that became law that same day.⁴² In making the proposal, he first refamiliarized the Senate with the issue of fees in tax cases by referring to both the Goldwater amendment and to his own earlier amendment. He then went on to describe his new proposal:

³⁹ In Senator Allen's introduction of the amendment, he stated: We know all too well the proclivity of the IRS to harass taxpayers throughout the country. It is only right, Mr. President, that if the Government harasses a taxpayer, brings a frivolous action against him, and it is found that the taxpayer does not owe the Government any money, that action may have been before the courts for many years and may well have bankrupted the taxpayer in attorney's fees for the defense of that action; but if in the final determination of the suit it is found that he owes nothing, then the Government should be required to pay.

Id. at S16428.

It is not surprising that Senator Allen limited the amendment to defendant-taxpayers. Before introducing his amendment, the Senator, in a lengthy tirade, questioned the Senate's motivation in awarding attorney's fees to plaintiffs in civil rights cases. The original bill, relating exclusively to civil rights cases, applied to both plaintiffs and defendants. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 6 (1976). The Senator stated that he did "not believe it is up to the United States Government to subsidize attorneys who bring actions against individuals, against corporate entities, against governmental bodies. It certainly is an encouragement to the stirring up of litigation." 122 CONG. REC. S16428 (daily ed. Sept. 22, 1976).

⁴⁰ See 122 CONG. REC. S16445 (daily ed. Sept. 22, 1976).

⁴¹ The Senator described his new proposal as follows:

[M]y amendment only applies when the Internal Revenue Service pursues a second audit. . . . [M]y amendment covers accounting fees as well as legal costs. . . . [M]y amendment covers expenses in administrative proceeding as well as in court. . . . [M]y amendment covers suits brought by the taxpayer himself as well as suits brought by the Government.

. . . . [T]he need for this amendment stems from the all-too-common practice of the Internal Revenue Service to reaudit taxpayers who have already been thoroughly audited once and may even have been told that there is no change in their taxes.

The amendment would not prevent the Government from making a second audit, but it may stop the IRS from harassing people.

Id. at S16446.

⁴² See text at note 5 *supra*.

What it does is to add to the civil rights attorney's fees provision a provision that if the Internal Revenue Service of the United States Government brings a civil action against a taxpayer to enforce any provision of the Internal Revenue Code, and the Government does not prevail against the taxpayer, then the court, in its discretion, just as in the other cases, would be entitled to award the taxpayer reasonable attorney's fees. That is all it does. . . .⁴³

Most congressmen, hearing this description of his new bill and knowing of Senator Allen's prior statements in proposing his first amendment, would construe the language applying the bill to "actions or proceedings" initiated "by or on behalf of the United States" as limiting the bill's application to defendant-taxpayers.⁴⁴

Statements by various congressmen, made both prior to adoption of the amendment and prior to passage of the entire bill, indicate that this is exactly how they interpreted the scope of the bill. For example, Senator Tunney of California, the initial sponsor of the civil rights portion of the Act, voiced his support of the Allen amendment and explained his view of the proposal: "Essentially, it would apply to a situation where a taxpayer is harassed by the IRS. In such a case, a court has discretion to award reasonable attorney's fees to the defendant."⁴⁵ Following adoption of the amendment, but prior to passage of the entire bill, Senator Kennedy stated his view of the amendment:

⁴³ 122 CONG. REC. S17049 (daily ed. Sept. 29, 1976). Since Senator Allen was the initial sponsor of the amendment, his statements warrant careful consideration by courts in reviewing the legislative history. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). The influence of a bill's sponsor on other members of Congress who are trying to understand the bill's scope and decide how to vote is thought to be great. Moreover, members of Congress presumably were cognizant of Senator Allen's statements regarding his first amendment. At that time, the Senator blasted his fellow congressmen for "taking care of lawyers on their fees," and warned of the potential for "stirring up of litigation" by authorizing fee awards to plaintiffs under S. 2278. 122 CONG. REC. S16428-29 (daily ed. Sept. 22, 1976); see also note 39 *supra*. The legislators had no reason to assume that the Senator had changed his position regarding attorney's fees to plaintiffs. Indeed, in introducing the second amendment, he mentioned its applicability to situations where "the Internal Revenue Service or the United States government brings a civil action against a taxpayer," and ended by saying "that is all it does."

⁴⁴ The only indication that Senator Allen had changed his position was his reference to the Goldwater proposal, which authorized awards to plaintiffs as well as defendants. Senator Allen began his introductory remarks by noting that "this amendment is not unfamiliar to the Senate. It is similar to the Goldwater amendment. It is similar to an amendment that the Senate registered 39 votes for in earlier proceedings [referring to his own earlier amendment, defeated by a 47-39 vote]." 122 CONG. REC. S17049 (daily ed. Sept. 29, 1976). These references to earlier amendments, however, do not indicate that Senator Allen changed his position on attorney's fees. He referred to the prior amendments merely to refresh the Senate's memory of the general issue of attorney's fees in tax disputes.

⁴⁵ 122 CONG. REC. S17050 (daily ed. Sept. 29, 1976) (emphasis added).

A court would be authorized in awarding attorney's fees to a taxpayer who is a *defendant* in a civil action brought by the U.S. Government to enforce the provisions of the Internal Revenue Code. . . . Since the amendment is intended to apply solely to *prevailing defendants* in tax cases, the courts would be guided by well-settled judicial standards in the exercise of their discretionary authority to make fee awards to defendants.⁴⁶

In the House of Representatives, Representative Drinan, sponsor of the House version of the bill, introduced Senator Allen's amendment by saying: "The Allen amendment would allow the prevailing party to recover its counsel fees in any civil action brought by the United States to enforce the Internal Revenue Code. It would not apply to actions instituted against the government by the taxpayer."⁴⁷ These statements all show a clear understanding that the bill applies only to defendant-taxpayers.

The sole hope for plaintiff-taxpayers seeking attorney's fees is the phrase applying the Act to "any civil action *or proceeding*." Senator Allen⁴⁸ and others⁴⁹ have argued that Congress used the word "proceeding" to indicate that the statute applies when the IRS initiates administrative processes against the taxpayer, regardless of which party brings the dispute to court. In a statement made over three months after passage of the bill, Senator Allen provided this tardy explanation of why he used the word "proceeding":

I inserted the word "proceeding" in my new amendment specifically to include administrative proceedings or audits so that fees and costs in connection with audits or other IRS agency proceedings could be awarded by a court on application by a prevailing taxpayer. I also included the term "proceeding" so that it would be clear that in any case involving a disputed tax, the court would be free to award attorney's fees . . . notwithstanding the formalistic characterization of the taxpayer as plaintiff or defendant. . . .⁵⁰

Although courts often quote Senator Allen's statement, they view his remarks as merely an expression of the Senator's opinion since he made them following passage of the bill.⁵¹

⁴⁶ *Id.* at S17050 (emphasis added).

⁴⁷ 122 CONG. REC. H12159 (daily ed. Oct. 1, 1976).

⁴⁸ 123 CONG. REC. S731 (daily ed. Jan. 14, 1977).

⁴⁹ See note 6 *supra*.

⁵⁰ 123 CONG. REC. S732 (daily ed. Jan. 14, 1977).

⁵¹ See, e.g., *Key Buick v. Commissioner*, 68 T.C. 178, 183 (1977). See also *Patzkowski v. United States*, 576 F.2d 134, 136 n.2 (8th Cir. 1978), where the court stated:

While we appreciate the candor of Senator Allen's acknowledgement that the Government can cause considerable discomfort to a taxpayer without making him a defendant in a lawsuit, we consider it significant that this commentary was made after the passage of the Act. Subsequent comments placed in the *Congressional Record* after a bill has been acted upon are of little value in establishing Congressional intent. Moreover, during the debate which occurred prior to the passage of the Act, it was uniformly specified and/or implied that awards of attorney's fees would be available only to taxpayer-defendants.

There is, however, case law distinguishing the words "action" and "proceeding", as used in other statutes, and defining the word "proceeding" to include certain IRS administrative activities.⁵² For instance, there are cases holding that activities such as issuance of a deficiency notice,⁵³ or negotiations over tax liability,⁵⁴ are "proceedings" initiated by the IRS within the meaning of these statutes. More importantly, some of these cases hold that a Tax Court suit instituted by the taxpayer after the issuance of an IRS deficiency notice is part of such "proceeding."⁵⁵ Whether these cases are relevant to the Civil Rights Attorney's Fees Awards Act is, however, questionable. In accordance with the primary rule of statutory interpretation, whereby courts give statutory language "such construction as will carry into execution the will of Congress,"⁵⁶ courts are not obliged to give the word "proceeding" the same meaning in every statute in which it is found. The wide variance in scope and meaning ascribed to the word "proceeding" in the context of other statutes⁵⁷ indicates that courts do not base their interpretation on any plain-meaning or straightforward definition of the word; rather, they view the term in the context of each particular statute, and derive its meaning from the policies of each statute as found in the legislative history.⁵⁸ Thus, cases interpreting the

⁵² See, e.g., *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 352 (1927); *American Standard Watch Co. v. Commissioner*, 229 F.2d 672, 675 (2d Cir. 1956); *United States v. P.F. Collier & Son Corp.*, 208 F.2d 936, 940 (7th Cir. 1953); *Bahen & Wright, Inc. v. Commissioner*, 176 F.2d 538, 539 (4th Cir. 1949); *Wheeler's Peachtree Pharmacy, Inc. v. Commissioner*, 35 T.C. 177, 181 (1960); *Ann C. Field v. Commissioner*, 32 T.C. 187, 206-07 (1959), *aff'd*, 286 F.2d 960 (6th Cir. 1960), *cert. denied*, 366 U.S. 949 (1961). Most of these cases deal with state statutes granting corporations a fictional existence following dissolution, so that the corporation can conclude "actions" or "proceedings" that were initiated by or against it during its statutory lifetime. See, e.g., DEL. CODE. tit. 8, § 278.

⁵³ *Bahen & Wright v. Commissioner*, 176 F.2d 538, 539 (4th Cir. 1949).

⁵⁴ *Ann C. Field v. Commissioner*, 32 T.C. 187, 206-07 (1959), *aff'd*, 286 F.2d 960 (6th Cir. 1960), *cert. denied*, 366 U.S. 949 (1961).

⁵⁵ *Bahen & Wright v. Commissioner*, 176 F.2d 538, 539 (4th Cir. 1949) (deficiency notice and subsequent Tax Court petition are "parts of an integrated administrative proceeding"); see also *American Standard Watch Co. v. Commissioner*, 229 F.2d 672, 675 (2d Cir. 1956). However, to the extent that these decisions are based on the assumption that the Tax Court is an administrative agency, these decisions are now irrelevant. The Tax Court, prior to 1969, was an administrative agency of the executive branch of government. See Int. Rev. Code of 1954, ch. 736, § 7441, 68A Stat. 879 (now I.R.C. § 7441). In 1969, however, the Tax Court became an official "court" under article I, section 8 of the Constitution via the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 730 (now I.R.C. § 7441). Hence, an assessment and hearing in the Tax Court is no longer an "integrated administrative proceeding," but a court action resulting from an administrative proceeding.

⁵⁶ *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (citing *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

⁵⁷ The flexible meaning of "proceeding" is indicated in other cases which hold that "proceeding" includes such activities as criminal prosecution, *United States v. P.F. Collier & Son Corp.*, 208 F.2d 936, 940 (7th Cir. 1953), or IRS tax collection by distraint, *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 352 (1927).

⁵⁸ The court in *Bahen & Wright v. Commissioner*, 176 F.2d 538 (4th Cir. 1949), for example, in interpreting "proceeding" in a Delaware corporate-dissolution statute, noted that "[s]tatutes of this type are broadly remedial and should be liberally

word "proceeding" in the context of other statutes can be distinguished from cases interpreting "proceeding" in the context of the Awards Act.⁵⁹

An examination of the policies and congressional intent behind the Allen amendment reveals that the word "proceeding" does not warrant a broad definition which would include IRS administrative activities. Every congressman discussing the bill referred only to court actions.⁶⁰ No one mentioned IRS harassment through administrative activity. Congress was aware of IRS administrative practices and the potential for harassment via these procedures since Senator Goldwater's proposal specifically referred to harassment through administrative action.⁶¹ For this reason, the legislative statements referring solely to court action reflect a deliberate attempt to limit application of the amendment; there was no congressional oversight of the possibility of abusive administrative conduct. The legislative intent, as derived from such statements, clearly limits the Act to protecting taxpayers against harassing or vexatious *lawsuits*. Although this interpretation gives the words "action" and "proceeding" virtually synonymous meanings, rules of statutory construction do not forbid the use of two general, flexible terms together in a way that gives them one collective meaning where the congressional purpose requires that result.⁶² Thus, in interpreting the Awards Act so as to effectuate the will of Congress, courts have properly limited the scope of the bill to *lawsuits* initiated "by or on behalf of the United States."⁶³

construed in order to permit a dissolved corporation to resist any claim made against it within three years after the date of dissolution." The court then decided to give "proceeding" a broader scope than "action" or "suit" "in order to achieve the fundamental purpose of the statute." *Id.* at 530.

⁵⁹ The court in *Key Buick v. Commissioner*, 68 T.C. 178 (1977), cited several of these corporate dissolution cases, and dismissed them quickly, noting that "[t]hese cases involve statutes so different from the statute here involved as to be of little assistance." *Id.* at 182 n.6.

⁶⁰ See, e.g., statements by Senator Allen found in text at note 43 *supra*; statements by Senator Kennedy found in text at note 46 *supra*; and statements by Representative Drinan found in text at note 47 *supra*.

⁶¹ See text and notes 40-41 *supra*.

⁶² Although the United States Supreme Court has frequently stated that courts should interpret a statute in such a way that every word and phrase is given meaning, see, e.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Platt v. Union R.R. Co.*, 99 U.S. 48, 58 (1878); see also 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 46.06 (4th ed. 1973), it has not done so where, as in the case of the Awards Act, it would contravene the legislators' purpose. As stated in *United States v. Zacks*, 375 U.S. 59 (1963):

It is, of course, our duty to give effect to all portions of a statute if that is possible. But this general principle is meant to guide the courts in furthering the intent of the legislature, not overriding it. When rigid adherence to the general rule would require disregard of clear indications to the contrary, the rule must yield.

Id. at 69.

⁶³ Even if a court defines the word "proceeding" to include IRS administrative proceedings, it is doubtful that refund suits in either federal district court or the Court of Claims would fall within the statute's scope. A refund suit follows the payment of taxes assessed through an IRS deficiency notice, or the accidental overpayment of taxes by the taxpayer. The notice and subsequent activities leading to assessment and

Courts have also been correct in concluding that they should award attorney's fees under the Act only if the IRS's claim is frivolous, vexatious, or harassing. Statements by several congressmen reveal their perception that the bill awards fees only in such cases.⁶⁴ For example, Senator Kennedy stated that "[b]y authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, . . . Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits."⁶⁵ Similarly, Representative Drinan noted that, "under settled judicial standards, prevailing defendants would recover their attorney fees only if they could prove that the United States brought the action to harass them, or if the suit is frivolous and vexatious."⁶⁶

This standard for recovery, referred to as "settled" by Representative Drinan, is similar to the standard which has developed for awarding attorney's fees to prevailing defendants in civil rights actions.⁶⁷ In civil rights cases where the prevailing defendant seeks attorney's fees, the defendant must prove that the plaintiff's suit is "vexatious and frivolous, or [that] the plaintiff has instituted it solely to harass or embarrass the defendant."⁶⁸ As men-

payment are arguably "proceedings" initiated by the IRS. But, once the taxpayer has paid the assessment, the IRS is satisfied and has no continuing interest in the issue. The proceeding has ended, and the refund suit which follows is entirely separate, and the choice of the taxpayer alone. As stated in *Engel v. United States*, 448 F. Supp. 201 (W.D. Pa. 1978):

While it is true that the interchange between counsel for the citizen and the IRS is begun by the IRS's issuance of a deficiency notice, it is also clear that the taxpayer who pays a disputed sum ends these proceedings as far as the administrative process is concerned. That an option to file suit thereafter is retained by the taxpayer does not change the fact that the United States has been satisfied and can no longer conduct proceedings on that claim in its behalf.

Id. at 202.

⁶⁴ Senator Allen, in his belated explanation of the amendment, urged use of criteria other than "bad faith or harassment." The Senator stated:

The court need not determine that the Government has harassed the taxpayer nor need the court determine that the Government has in some way acted in bad faith. The amendment as adopted mentions neither harassment nor bad faith, but for some reason, commentators have implied that such conduct would be a necessary precondition to an award of fees to a prevailing taxpayer. No, Mr. President, a court in exercising its discretion should focus rather on the relative resources of the parties and on the perseverance of the taxpayer in vindicating this position.

123 CONG. REC. S731 (daily ed. Jan. 14, 1977). However, these comments, aside from being late, are contrary to all other congressional indications, and hence are given no weight by the courts.

⁶⁵ 122 CONG. REC. S17050 (daily ed. Sept. 29, 1976).

⁶⁶ 122 CONG. REC. H12159 (daily ed. Oct. 1976).

⁶⁷ The committee reports on the original Awards Act discussed these standards at length. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976); S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908.

⁶⁸ H.R. REP. NO. 1558, 94th Cong., 2d Sess. 7 (1976); see also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

tioned in the House and Senate Reports, the reason for requiring a defendant to prove harassing or vexatious behavior before the court awards attorney's fees is to prevent the "chilling effect" on plaintiffs who wish to vindicate their rights.⁶⁹ If a lesser standard applied in civil rights cases, the knowledge that a plaintiff might have to pay a prevailing defendant's attorney's fees might deter him from instituting suit where the chances for a favorable decision are uncertain.⁷⁰ Statements in the floor debates concerning the Allen amendment indicate that Congress was wary of fostering a "chilling effect" in tax cases as well as in civil rights cases.⁷¹ As a result, it seems clear that Congress

⁶⁹ Both the House and Senate Reports refer to the "chilling effect" that authorizing fees for defendants in civil rights cases could have on plaintiffs' willingness to bring such actions. S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912; H.R. REP. NO. 1558, 94th Cong., 2d Sess. 7 (1976).

⁷⁰ This "vexatious and harassing" standard, applicable to *defendants* in civil rights cases in order to avoid a "chilling effect" on plaintiffs, should be contrasted with the standard for awarding fees to prevailing *plaintiffs* in civil rights actions. Both the Senate and House Reports on the Awards Act cited *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), a case involving racial discrimination in a place of public accommodation, which stated that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 409. The purpose for using such a light standard for fee awards to plaintiffs is "to give such persons effective access to the judicial process where their grievances can be resolved according to law." H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976). As noted in *Piggie Park*, "[i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the . . . powers of the federal courts." 390 U.S. at 402. *See also* S. REP. NO. 1011, 94th Cong., 2d Sess. 2-3 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910; 122 CONG. REC. S17051 (daily ed. Sept. 29, 1976) (remarks of Senator Tunney); 122 CONG. REC. H12165 (daily ed. Oct. 1, 1976) (remarks of Representative Seiberling).

It is significant to note that congressmen, in the floor debate relating to the Awards Act, constantly referred to the need to afford civil rights plaintiffs access to the courts, while never mentioning the need to afford taxpayer-plaintiffs access to the courts. Since the purpose of awarding fees to plaintiffs is to afford them greater access to the courts, the absence of this purpose in discussions relating to the Allen amendment suggests that Congress did not intend the Awards Act to apply to taxpayer-plaintiffs. Moreover, Senator Kennedy clearly stated that Congress was aware of the differing policies behind awards to plaintiffs as opposed to defendants, and deliberately restricted the application of Senator Allen's amendment to defendant-taxpayers:

[A] provision authorizing fee awards in tax cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorney's fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits.

122 CONG. REC. S17051 (daily ed. Sept. 14, 1976).

⁷¹ Senator Kennedy stated:

The courts have articulated the policy reasons for utilizing a stricter test in awarding fees to prevailing defendants than to prevailing plaintiffs, and

wished to award attorney's fees to prevailing taxpayer-defendants only if they could meet the same "bad faith or harassing" standard as required of defendants in civil rights cases.

III. ANALYSIS

A. *Application of the Awards Act*

From the preceding discussion of the legislative history, it is apparent that courts such as *Key Buick* and *Patzkowski* have acted properly in limiting application of the Awards Act to defendant-taxpayers who can show some sort of IRS wrongdoing or unreasonableness in bringing suit against them. Unfortunately for taxpayers, the practical utility of the Act is thus limited to relatively few individuals.⁷² Due to the procedures available for contesting one's tax liability, taxpayers must initiate court actions and be characterized as plaintiffs for purposes of the Awards Act in the vast majority of cases.⁷³ The limited

these apply equally in tax cases and in actions brought to enforce the civil rights laws. Awarding fees to prevailing defendants is intended to protect parties from being harassed by unjustifiable lawsuits. It is not, however, intended to deter plaintiffs from seeking to enforce the protections afforded by our civil rights laws, or in this instance to deter the Government from instituting legitimate tax cases by threatening it with the prospect of having to pay the defendant's counsel fees should it lose. Were Congress or the courts to provide otherwise, it would have a substantial chilling effect on the bringing of genuinely meritorious actions. I am sure that none of us would want to inhibit responsible lawsuits brought by the United States to enforce the tax laws of our country.

122 CONG. REC. S17051 (daily ed. Sept. 14, 1976). See also 122 CONG. REC. H12162 (daily ed. Oct. 1, 1976) (remarks of Representative Kastenmeier).

⁷² In 1978, taxpayers filed 13,284 suits against the IRS in Tax Court. They filed another 1,029 refund suits in federal district courts and in the United States Court of Claims. In contrast, the government filed only 750 suits to collect unpaid taxes, and 34 suits to collect erroneous refunds. It brought another 6,506 suits to enforce summonses of taxpayer's records. These numbers indicate that, aside from IRS enforcement of summonses, over 90% of all actions disputing tax liability are initiated by taxpayers. The Awards Act thus aids less than 10% of all taxpayer-litigants. [1978] COMMISSIONER OF INTERNAL REVENUE ANN. REP. 56-61.

⁷³ If a taxpayer wants to contest a deficiency notice, he can refuse to pay the tax and, within ninety days, file in the Tax Court a petition challenging the validity of the notice. I.R.C. § 6213. Alternatively, the taxpayer can pay the amount assessed, petition the IRS for a refund, I.R.C. § 6601, and, if it is denied, bring a refund suit in either a federal district court, 28 U.S.C. § 1346 (1976), or the Court of Claims, 28 U.S.C. § 1491 (1976). Similarly, if the taxpayer claims that he has overpaid his taxes and the IRS denies his refund request, he can institute a suit in either federal district court or the Court of Claims. Note that in each of these instances, the taxpayer is the plaintiff in the suit, and hence ineligible to recover attorney's fees under the Awards Act.

Conversely, the most common situations in which the government sues the taxpayer are when the Service alleges that it has made an erroneous refund, I.R.C. § 7405; when it seeks to enforce a statutory lien resulting from nonpayment of taxes, I.R.C. § 7403; or when it seeks to enforce a summons which a taxpayer has ignored, I.R.C. § 7604. As mentioned earlier, see note 72 *supra*, these situations are rare in comparison with the total volume of taxpayer-IRS litigation.

scope of the Awards Act thus severely restricts the number of instances in which awards are appropriate.

Only twice have courts found that the government's action was sufficiently unjustified to warrant an award of attorney's fees to a defendant-taxpayer. In *United States v. Garrison*,⁷⁴ the government sued to enforce a summons directing the taxpayers to turn over their business records for inspection by IRS agents. The taxpayers refused to comply with the summons, claiming that section 7605(b) of the Internal Revenue Code protects taxpayers from more than one inspection of books and accounts for a taxable year unless the taxpayer requests the inspection or the Secretary notifies the taxpayer in writing that another inspection is necessary. Since this was to be a second inspection of the books and the IRS had failed to request a second inspection in writing, the court refused to enforce the summons. On respondent's request for attorney's fees, the court held that the IRS's lawsuit constituted an "unnecessary and vexatious burden upon the taxpayer which required it to employ counsel to defend this action."⁷⁵ The taxpayers were therefore allowed to recover reasonable attorney's fees from the government.

Attorney's fees also were awarded to a taxpayer-defendant in the case of *In re Slodav*.⁷⁶ In that case, the taxpayer had assumed control of three corporations which, at the time of takeover, were delinquent in payment to the government of employee wage withholdings and FICA taxes. Although the corporations had insufficient funds to pay these pre-takeover taxes immediately, Slodav desired to keep current on all post-takeover payments of employee withholdings to avoid incurring personal liability under Code sections 6672 and 7501.⁷⁷ To accomplish this goal, Slodav and the IRS agreed to apply his payments first to post-takeover obligations for which he was personally liable (*i.e.*, employee income tax and FICA withholdings, characterized as "trust funds" under section 7501), and the remainder to other post-takeover obligations to which no personal liability attached (*i.e.*, employer's share of FICA, referred to as a "non-trust fund" obligation).⁷⁸ There was no reference in the agreement to the responsibilities, if any, of either Slodav or the corporate treasuries for pre-takeover taxes. The Service breached its promise, and simply allocated the payments between the post-takeover non-trust fund obligations and the post-takeover trust fund obligations. As a result, Slodav fell behind in his current trust fund payments. When Slodav's

⁷⁴ 77-2 U.S. Tax Cas. ¶ 9705 (N.D. Ala. 1977).

⁷⁵ *Id.*

⁷⁶ 79-1 U.S. Tax Cas. ¶ 9215 (N.D. Ohio 1979).

⁷⁷ I.R.C. § 6672(a) imputes personal liability to any person who is entrusted with the duty of collecting taxes and who willfully fails to collect and pay the amounts over to the Government. It also imposes a penalty of 100% of the uncollected or unpaid amounts. I.R.C. § 7501 requires a taxpayer to keep any amounts collected separate from the employer's own funds, and hold the funds in a special "trust" for the United States. Failure to collect and pay these "trust fund" amounts results in personal liability under § 6672.

⁷⁸ The court noted that the IRS Field Collection Manual required the IRS to honor this agreement. 79-2 U.S. Tax Cas. ¶ 9215, at 86,407.

business fortunes foundered, and he filed for bankruptcy, the Service brought personal claims against him under section 6672 for willful failure to pay his *post*-takeover trust fund withholding taxes. In addition, the Service claimed that Slodav was personally liable for nonpayment of the delinquent *pre*-takeover trust fund obligations.

Slodav's liability for post-takeover trust fund payments was resolved in his favor by the Sixth Circuit⁷⁹ after two appeals from decisions in the bankruptcy proceedings⁸⁰ and in district court.⁸¹ The government's claim for pre-takeover liability went to the United States Supreme Court before being decided in Slodav's favor.⁸² After these disputes were resolved, Slodav brought suit in the district court requesting his attorney's fees under the Awards Act.

The district court accepted the *Patzkowski* standard for awarding fees, but decided that the government's claim for pre-takeover taxes, although novel, was "not a case where the position of the IRS can be said to be without foundation, meritless, or founded in bad faith."⁸³ As to the claim for post-takeover taxes, however, the court found that the IRS had disregarded a valid agreement to allocate corporate payments in a particular way, and that the IRS's failure to abide by the agreement led to the claim for post-takeover liability.⁸⁴ Therefore, the claim under section 6672 for these amounts was "wholly without foundation," and was "an act done in bad faith."⁸⁵ The court went so far as to state that "[w]hat the IRS practiced on Dr. Slodav was trickery—nothing less."⁸⁶ The court thus awarded attorney's fees to Slodav in an amount representing his defense of post-takeover liability.

Although the case law development in this area is still in its nascent stages, one can envision other circumstances where awards of attorney's fees would be appropriate. For example, courts may find it proper to award fees when the IRS takes a position that is plainly contrary to existing legal precedent. This situation is likely to arise when IRS administrative policy differs from judicial interpretation of the law. Occasionally, the Service may use a taxpayer as a "guinea pig" to challenge a past court decision. Even worse, it may attempt to force the taxpayer to agree to an out-of-court settlement where the IRS knows that settlement is a more attractive option than a costly legal battle. Of course, a court still must decide the difficult question of whether the action was in any way reasonably well-founded. But courts should consider such actions proper occasions for awarding attorney's fees.

Another situation in which a court may award attorney's fees to a taxpayer is where the IRS engages in "fishing expeditions" to ferret out tax liability. The taxpayer may incur attorney's fees in resisting audits or summonses of

⁷⁹ *In re Slodav v. United States*, 552 F.2d 159 (6th Cir. 1977).

⁸⁰ *In re Slodav*, 74-2 U.S. Tax Cas. ¶ 9719 (N.D. Ohio 1974).

⁸¹ *In re Slodav*, 75-2 U.S. Tax Cas. ¶ 9829 (N.D. Ohio 1975).

⁸² *Slodav v. United States*, 436 U.S. 238 (1978).

⁸³ 79-2 U.S. Tax Cas. ¶ 9215, at 86,409.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 86,410.

records when the Service cannot show the required reasonableness in suspecting the taxpayer of some type of tax sin, or in suspecting that certain requested records are relevant to the Service's inquiry into tax liability.⁸⁷ Courts certainly should consider such suits to compel audits or production of records as "vexatious or unreasonable."⁸⁸

B. *The Efficacy of the Awards Act*

Cases such as *Slodav* and *Garrison* graphically demonstrate that Congress was correct in assuming that taxpayers sometimes suffer greatly as a result of harassing or frivolous lawsuits instituted by the IRS. Thus, Congress was justified in authorizing awards of attorney's fees to a taxpayer who is required to employ counsel to defend against the unreasonable action. The question that remains is whether it was reasonable for Congress to distinguish between plaintiff and defendant taxpayers. To the extent that Congress was concerned with protecting taxpayers against harassing, unreasonable, or bad faith conduct by the IRS—and all indications are that this was exactly their concern⁸⁹—the answer must be no.

All taxpayers who are subjected to abuses of power by the IRS, whether plaintiff or defendant, are deserving of attorney's fees. The taxpayer suffers

⁸⁷ Section 7602 of the Internal Revenue Code states:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting such liability, the Secretary is authorized—

- (1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) to summon the person liable for tax . . . or any other person the Secretary may deem proper, to appear before the Secretary . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

Section 7602 thus defines the proper purposes for which a summons may issue, and also limits the scope of a summons to those persons, books, or records which may be "relevant or material" to carrying out those purposes. The test of materiality and relevance has been defined as whether the books or persons sought "might throw light on the correctness of the taxpayer's return." *United States v. Matras*, 487 F.2d 1271, 1274 (8th Cir. 1973); *United States v. Shlom*, 420 F.2d 263, 265 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

Thus, where the Service issues a summons for an improper purpose, *see United States v. LaSalle*, 437 U.S. 298, 318 (1978) (discussing the impropriety of a summons issued to gather evidence for a criminal prosecution), or seeks books that are not "relevant or material" to an inquiry within a proper purpose, a court may find the suit "harassing or vexatious," and award attorney's fees.

⁸⁸ This was the situation confronting the court in *United States v. Goldman*, 453 F. Supp. 508 (C.D. Cal. 1978). Although the court found that certain records sought by the IRS did not contain information that "might throw light on the correctness of [the taxpayer's] income tax liabilities," it denied attorney's fees because "the summons was issued in good faith and for a proper purpose." *Id.* at 512.

⁸⁹ See text at notes 65-66 *supra* (remarks of Senator Kennedy and Representative Drinan); see also the remarks of Senators Helms, Tunney, and Kennedy, all mentioning harassment by the IRS as the mischief at which the bill is aimed, 122 CONG. REC. S17050 (daily ed. Sept. 29, 1976).

equally in terms of time, cost, mental aggravation, and tying up of assets involved whether he pays the disputed tax and brings a refund suit, or refuses to pay the tax and is subjected to a government collection suit against him. Yet the Awards Act distinguishes between taxpayer-defendants and taxpayer-plaintiffs. The anomolous result is that the statute penalizes taxpayers who pay IRS assessments and seek after-the-fact judicial review by denying them attorney's fees, while it rewards those who ignore IRS assessments and are brought into court by the IRS. The reason for this unjust result is unclear. Perhaps, as Senator Allen suggested, Congress was concerned about "stirring up litigation" if it were to authorize attorney's fee awards for plaintiffs.⁹⁰ However, even if this concern is a rational one, a better course would have been for Congress to allow plaintiffs to recover their fees, but only where they could meet the same "bad faith or harassing" standard used for taxpayer-defendants. Instead of adopting the more lenient standard used for awarding attorney's fees to prevailing plaintiffs in civil rights cases, where they would "ordinarily recover their fees,"⁹¹ Congress could have imposed the tougher "bad faith or harassing" standard. In this way, Congress could have avoided "stirring up" litigation, while at the same time allowing taxpayers to protect themselves against wrongful IRS activity.

Indeed, there is good reason for rejecting the standard governing recovery by plaintiffs in civil rights cases, aside from the fear of proliferation of litigation. Suits instituted by plaintiffs under the civil rights laws have the beneficial effect of furthering public policy, in addition to allowing private recovery.⁹² Civil rights plaintiffs act, in essence, as "private attorneys general."⁹³ By comparison, awarding fees to prevailing taxpayer-plaintiffs would not promote any public policy; taxpayers act only for themselves and their pocketbooks in contesting IRS claims, and cannot, in any sense, be characterized as "private attorneys general." Thus, there is no basis for applying the more lenient standard developed for prevailing civil rights plaintiffs to prevailing taxpayer-plaintiffs.

Nonetheless, since taxpayer-plaintiffs are subject to the same costs, mental aggravation, time, and tying-up of assets as taxpayer-defendants, a bill to provide attorney's fees for *any* prevailing taxpayer, regardless of his ultimate status in court, is warranted. Since the injuries are the same, the standards for recovery should also be the same. Therefore, Congress could have better achieved its purpose if it had drafted the Awards Act to allow any taxpayer who is subject to a frivolous, unfounded, or harassing entanglement with the IRS that ultimately results in legal action to recover his attorney's fees.

⁹⁰ See note 39 *supra*. Although the Senator's statements refer to the civil rights portion of the Awards Act, it is reasonable to assume that his concern carried over into the area of tax litigation.

⁹¹ See note 70 *supra*, for discussion of the standard for awarding fees to prevailing plaintiffs in civil rights cases, and the policy reasons behind that standard.

⁹² *Id.* See also note 2 *supra*.

⁹³ See note 70 *supra*.

New proposals have been made in both houses of Congress which would achieve this result by extending eligibility for attorney's fees to *any* prevailing taxpayer. One such bill, introduced by Senator Allen, provides:

In any civil action wherein the United States or the Internal Revenue Service is a party and in which tax liability to the United States on the part of any person is asserted, the court may in its discretion award reasonable attorney's fees to the prevailing party other than the United States or the Internal Revenue Service.⁹⁴

Until Congress passes a bill such as this, taxpayers must continue to consider the costs of litigation when deciding whether to contest IRS claims against them. Although the Awards Act was a step in the right direction, it is, in reality, only half a step. Congress should move to provide the full protection for *all* taxpayers that is needed to prevent the IRS from engaging in activities which are plainly unjustified, but which may go unremedied unless taxpayers can recoup the costs of seeking justice.

CONCLUSION

Courts have narrowly construed the Civil Rights Attorney's Fees Awards Act of 1976, as applied to tax litigation, so as to benefit only a few taxpayers. Although Congress deliberately restricted the availability of attorney's fees to prevailing taxpayer-defendants, this restriction is unfair and, indeed, irrational. Congress' desire to award attorney's fees to individuals who suffer from abusive IRS behavior should extend to both plaintiff- and defendant-taxpayers. Furthermore, the standards for awarding fees should be the same in both instances. Allowing taxpayers to recover whenever they can show harassing, vexatious, or frivolous action by the IRS would sufficiently protect them from the harm with which Congress was most concerned, and, at the same time, would avoid stirring up litigation or chilling the Service's willingness to collect taxes. A move to expand the coverage of the Awards Act to *all* taxpayers is warranted.

JEFFREY R. MARTIN

⁹⁴ S. 1610 was sponsored by Senators Allen and Cranston; it has been referred to the Judiciary Committee and is presently awaiting consideration. 123 CONG. REC. S8764 (daily ed. May 26, 1977); see also, H.R. 6903, H.R. 8260, and H.R. 8312, introduced on May 4, 1977, July 13, 1977, and July 14, 1977, respectively. 123 CONG. REC. H4061, H7070, and H7170.