Valparaiso University Law Review

Volume 19
Number 1 *Symposium: Rights, Work, and Collective Bargaining*

*pp.*153-195

Symposium: Rights, Work, and Collective Bargaining

Award of Attorney Feeds in Tax Litigation

Mary Ann Link

NOTES

AWARD OF ATTORNEY FEES IN TAX LITIGATION

I. INTRODUCTION

The current American Rule[1] of cost allocation, which holds litigants responsible for their own attorney fees and other litigation expenses, has both common law and statutory exceptions. Under the common law, courts have the power to award fees when overriding considerations of justice so demand. First, the bad faith exception permits an award of attorney fees when the losing party has willfully disobeyed a court order, acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[2] Second, the common fund or common benefit exception[3] allows the court to award attorney fees to a party whose legal action creates or preserves a fund of money or other assets for the benefit of others as well as for the litigating party. Finally, a series of statutory exceptions modify the American Rule.

---

1. The American Rule is founded on the belief that a litigant should not be penalized for either the prosecution or the defense of a lawsuit. In Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967), the Supreme Court noted that the repeal of the American Rule would threaten independent advocacy since the poor might not initiate actions to protect their rights if the additional liability of their opponents' attorney fees loomed as a consequence of defeat.

In contrast, English courts have awarded counsel fees to successful plaintiffs since 1278 when the Statute of Gloucester, 6 Edw. I. Ch. 1 (1275) became effective. In England, defendants gained the right to an award of attorney fees in 1607. The disparity between plaintiff and defendant recovery rights has persisted through rather recent statutory exceptions to the American Rule. *See infra* text accompanying notes 51 and 52.

2. Particular activities or conduct serve as concrete definitions of bad faith and as support for the right to an award of attorney fees. Other terms that have been employed by the courts are "obdurate obstinacy," "wantonness," "dilatory," "groundless," "oppressive," and the like.
See generally 31 A.L.R. FED. 833 (1977). *See also* Hall v. Cole, 412 U.S. 1 (1973).

3. Absent a statutory prohibition, federal courts may award attorney fees from a fund to a party. The party must have a common interest with other persons and must have maintained, at his own expense and for the common benefit of those persons, a suit which resulted in the creation or preservation of a fund in which all of those having the common interest share. *See* Vaughan v. Atkinson, 369 U.S. 527, 531 (1962).

Two statutes which have affected tax litigants are representative of legislation which has been enacted at least in part to offset litigation expenses[4] which often impede a citizen from bringing suit against the government on a valid claim.[5] The Equal Access to Justice Act of 1980[6] (EAJA) amended[7] 28 U.S.C. §2412(a) to provide explicitly that costs, but not attorney fees, could be awarded against the United States. EAJA reiterated the American Rule and also provided an exception to it.[8] The Tax Equity and Fiscal Responsibility Act of 1982[9] (TEFRA) removes tax litigants from coverage by EAJA and allocates the burden of proof to the taxpayer. Both EAJA and TEFRA follow

---

4. The word "expenses" will be used throughout this note to refer to any expenditures made by a litigant. "Fees" refers to the amount paid to an attorney, and "costs" encompasses all other litigation expenditures.

5. The extensive resources and personnel of government agencies render the decisions of these bodies almost impervious to challenge by the common citizen unless that individual is benefited by statutory provisions which help to ensure each person a day in court for the adjudication of appropriate complaints. Equal Access to Justice Act, § 201, 5 U.S.C. § 504 note.

6. Equal Access to Justice Act, Pub.L. No. 96-481, 94 Stat. 2325 (codified in various United States Code sections of different titles including 5 U.S.C., 28 U.S.C., and 48 U.S.C.).

7. Throughout this note EAJA will be discussed in the past tense. Even though the statute is still viable, it no longer applies to tax litigation.

8. The pertinent provision reads:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in Section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

28 U.S.C. §2412(a) (Supp. 1983).

The subsequent paragraph of the same section creates an immediate statutory exception with the following words:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. §2412(b) (Supp. 1983).

Therefore, whereas costs may be awarded in any litigation, fees may be awarded only pursuant to similar statutory language.

9. Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, (codified at 26 U.S.C. § 7430 (Supp. 1983)) (relating to the recovery of attorney fees).

the congressional trend toward authorized recovery of attorney fees in areas of specific and compelling public interest.[10]

The Civil Rights Attorney's Fees Awards Act of 1976, a section of which is known as the Allen Amendment, was the first statute providing for the recovery of attorney fees in tax litigation.[11] However, the vague language of the amendment[12] and the confusion surrounding its procedural application led to such strict judicial interpretation that the statute's effect on the recovery of attorney fees in tax litigation was negligible.

---

10. Among the areas of specific and compelling public interest are civil rights. Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000 a-3(b) and 2000 e-5(k) (1976) authorize the court to allow a prevailing party, other than the Equal Employment Opportunity Commission or the United States, reasonable attorney fees as part of the costs in an action under the equal employment opportunities and the public accommodations parts of the Act. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3612(c) (1975), provides that the court may grant reasonable attorney fees to a prevailing plaintiff who in the opinion of the court is not financially able to assume said attorney fees.

The court may grant reasonable attorney fees and other litigation costs reasonably incurred under Title III of the Organized Crime Control Act, 18 U.S.C. § 2520(c) (1976). The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976) states that when a litigant has substantially prevailed, the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred. The Voting Rights Act of 1975, 42 U.S.C. § 1973*l*(e) (1976), encourages private litigants to act as private attorneys general through the provision of attorney fee awards.

The Consumer Product Safety Act, 15 U.S.C. § § 2059(e)(4), 2060, 2072(a), and 2073 (1976), defines a reasonable attorney fee as one based upon (1) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this Act, (2) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (3) a computation at the prevailing rate for provision of similar services with respect to actions brought in the court which is awarding the fee.

11. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976) provided in pertinent part, before it was amended by the Equal Access to Justice Act:

> [In] any civil action or proceeding, by or on behalf of the United States to enforce, or charging a violation of, a provision of the United States Internal Revenue Code of Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States reasonable attorney fees as a part of the costs.

This statute, of course, pre-dated and is largely unrelated to EAJA.

12. *See supra* note 11. *See also* Note, *Attorney's Fees In Tax Litigation,* 45 BROOKLYN L. REV. 53, 65-79 (1978) [hereinafter cited as Note, *Attorney's Fees*]. Courts have held that the Allen Amendment applied only to an extremely limited number of cases of administrative harassment, thus virtually negating the statute's applicability. *See infra* notes 58-72 and accompanying text.

EAJA preserved the concept that taxpayers should have an opportunity to recover attorney fees. The Act provided in pertinent part that litigants in any civil action or agency adjudication, including, at that time, taxpayers who could show that the government lacked a reasonable basis for its action, might recover attorney fees in Article III courts.[13] EAJA offered taxpayers a better chance of recovering attorney fees than had previously been available.[14] However, the opportunity for recovery under this Act was still denied to litigants in the Tax Court[15] the only court where one may settle a tax dispute without first paying the tax.[16] Although no longer applicable to any tax litigation, EAJA is still a viable statute and remains in effect; however, on September 30, 1984, its costs and fees section expired pursuant to a sunset provision.[17]

In 1982 Congress enacted TEFRA. One section of this current statute provides for the recovery of attorney fees in all tax litigation.[18] This section simultaneously removes tax litigation from the aegis of

---

13. The Constitution states that:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior and shall at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. The significance of EAJA's applicability in only Article III courts is that the Tax Court is excluded; therefore, much tax litigation was also excluded. *See infra* note 15.

14. EAJA's language was more specific than that of the Allen Amendment. Therefore, litigants were no longer constrained by the judicially inferred standard of administrative harassment. Instead of requiring the taxpayer to prove harassment, EAJA provided that the government show substantial justification for its actions. *See infra* notes 95-99 and accompanying text.

15. Since the Tax Court is not an Article III court, recovery of attorney fees was not allowed there under EAJA. The Tax Reform Act of 1969 gave the Tax Court the status of a legislative court under Article I, Section 8, Clause 9 of the Constitution which provides that one power of Congress is, "To constitute Tribunals inferior to the Supreme Court." I.R.C. § 7441 states, "There is hereby established under Article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." The Tax Court has the power to adjudicate tax deficiencies, but Tax Court judges do not have life tenure as do judges of an Article III court. Tax Court judges are appointed for a fifteen year term and must retire at age seventy. For a detailed history of the Tax Court, see H. DUBROFF, THE UNITED STATES TAX COURT (1979).

16. 9 *Stand. Fed. Tax Rep.* (CCH) ¶5801.17 states, "The Tax Court was created primarily to afford a taxpayer an opportunity to be heard before being compelled to pay an income, gift, or estate tax."

17. 28 U.S.C. § 2412 (1976).

18. TEFRA, 26 U.S.C. § 7430 (Supp. 1983).

EAJA and lifts the bar to recovery of attorney fees for litigation in Tax Court.[19]

This note explores the development of legislation permitting the recovery of attorney fees in tax litigation. Beginning with an examination of the judicial interpretation of the Allen Amendment, the note continues with a chronological analysis of EAJA and TEFRA. It concludes with a consideration of currently proposed legislation which would repeal the section of TEFRA that applies to tax litigation and establish EAJA as a permanent statute.

The comparison of these four enactments reveals differences in the courts to which the statutes apply, the standards of recovery, and the amounts recoverable. For taxpayers attempting to recover fees, a difference of primary importance is the allocation of the burden of proof to the government under EAJA[20] and to the taxpayer under TEFRA.[21] The most similar features of the two currently operative statutes, EAJA and TEFRA, are their sunset provisions which indicate that the statutes will expire on September 30, 1984, and December 31, 1985, respectively.[22]

Before September 30, 1984, Congress may choose from among several alternatives: allow the statutes to expire, extend the statutes as currently written, modify both statutes, or combine the first three options in some way. A congressional decision to bring tax cases back within the scope of EAJA will abolish the inequity which currently exists regarding burden of proof. However, in order for EAJA to apply to all tax litigation, the statutory language must be altered so as to apply to Tax Court and all federal courts. An equitable solution is for Congress to adopt one standard for all litigants who attempt to recover attorney fees from the government. The most prudent Congressional action would be to allow the fee recovery section of TEFRA to expire and to extend EAJA, after including all tax litigation within its scope through the use of more specific and forceful language than that which exists in Senate Bill 919.[23]

II. THE ALLEN AMENDMENT

The need for precise statutory language is apparent at each step in the historical development of attorney fee award provisions. The effect of vague language upon judicial interpretation is nowhere more

19. *See infra* notes 177-199 and accompanying text.
20. *See infra* notes 97-103 and accompanying text.
21. *See infra* notes 185-192 and accompanying text.
22. 28 U.S.C. § 2412 and 26 U.S.C. § 7430 (Supp. 1983).
23. S. 919, 98th Cong., 1st Sess. (1983).

apparent than in cases based upon the Allen Amendment. Courts considering this statute construed such apparently straightforward, yet inherently vague, phrases as "civil action or proceeding"[24] and "by or on behalf of the United States"[25] to mean that the statute was inapplicable to most tax litigation. From its inception, the Allen Amendment was enmeshed in both political and judicial controversy because its purpose and scope were indefinite.[26]

The Allen Amendment was enacted in 1976, during a decade when an award of attorney fees was a significant part of a remedy that a court could fashion in order to carry out congressional policy embodied in civil rights and environmental laws.[27] Since private litigation was frequently the major means of securing broad compliance with the law, courts encouraged the concept of private attorneys general.[28] Because private parties were largely unable to bear the cost of public interest litigation[29] courts awarded attorney fees to prevailing private attorneys general. From the outset this practice was controversial because of the strong tradition of the American Rule.

In 1975 the United States Supreme Court struck down nonlegislative designations of private attorneys general in *Alyeska Pipeline Service Co. v. Wilderness Society.*[30] After the pivotal *Alyeska* decision, courts no longer award attorney fees to a party unless that individual falls within either a common law or statutory exception to the American Rule.[31] The Allen Amendment was a part of the congressional reaction to the restrictions enunciated in *Alyeska* and became the first statute providing for the recovery of attorney fees in tax litigation.

---

24. *See supra* notes 11 and 12 and *see infra* notes 58-72 and accompanying text.

25. *Id.*

26. *See infra* notes 35 and 66 and accompanying text.

27. Note, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation,* 33 MD. L. REV. 379 (1973).

28. Attorney fees incurred in civil rights actions may be awarded under the private attorney general theory where private plaintiffs have aided in effectuating important congressional and public policies. *See, e.g.* Morales v. Haines, 486 F.2d 880 (7th Cir. 1973).

29. *See, e.g.,* Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) which noted that a developer's refusal to sell lots to blacks and to whites on the same terms entitled black plaintiff, acting as a private attorney general, to recover attorney fees.

30. 421 U.S. 240 (1975). The Court declared that designations of private attorneys general conflicted with the traditional presumption against attorney fees "deeply rooted in our history and in congressional policy." *Id.* at 271. For a thorough discussion of *Alyeska, see* Note, *Attorney's Fees, supra* note 12, at 57-59.

31. *See supra* note 1.

The primary focus of the congressional reaction to *Alyeska* was not tax, but civil rights legislation. In 1975, Senator John Tunney[32] introduced a bill which would have authorized an award of attorney fees for specified civil rights actions.[33] As initially introduced, the bill which became the Civl Rights Attorney's Fees Awards Act of 1976 provided for the recovery of attorney fees only in cases in which the enforcement of civil rights depended heavily upon private individuals initiating the litigation.[34] Twice the late Senator James B. Allen tried to extend the civil rights bill to tax litigation.[35] Senator Allen's initial and unsuccessful amendment focused on alleviating the effects of frivolous or vexatious administrative harassment.[36] Senator Allen then offered an amendment, later passed by both the Senate and the House, to include the statutes under which reasonable attorney fees could be awarded to the prevailing party.[37] By the time the Allen Amendment appeared in its final form, the language contained absolutely

---

32. Senator Tunney is a Democrat from California.

33. The bill, S. 2278, 94th Cong., 1st Sess., 121 CONG. REC. 26806 (1975) provided:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

34. 122 CONG. REC. 33313 (1976) (remarks of Sen. Tunney, sponsor of S. 2278).

35. Senator James B. Allen, a Democrat from Alabama, introduced the first amendment, No. 472 [amending S. 2278, 94th Cong. 2d Sess., 122 CONG. REC. S. 16428 (1976)], which provided for an award of reasonable attorney fees in the court's discretion "where the suit is brought by the IRS against any person and said suit is found in such action to be without merit or frivolous." This amendment was rejected. 122 CONG. REC. S. 16430 (daily ed. Sept. 22, 1976).

Senator Allen's second amendment, No. 2419 [amending S. 2278, 94th Cong., 2d Sess., 122 CONG. REC. S. 17049 (1976)] authorized courts to allow reasonable attorney fees as part of the costs in any civil action or proceeding, by or on behalf of the United States of America, either to enforce or charge a violation of a provision of the United States Internal Revenue Code. Because Senator Allen opposed the central provisions of the civil rights legislation, the possibility exists that he introduced the tax aspect of the attorney fee bill in order to retard or defeat the passage of the bill. Whatever the senator's motivation may have been, both the Senate and the House passed the amended version of the attorney fees bill. 122 CONG. REC. S. 517050 and H. 17053 (1976). *See* Note, *Attorney's Fees*, *supra* note 11, for a thorough discussion of the flurry of legislative activity regarding both tax and civil rights issues in 1975-1976.

36. The unsuccessful amendment, No. 472 [amending S. 2278, 94th Cong. 2d Sess., 122 CONG. REC. S. 16428 (1976)], provided for an award of reasonable attorney fees in the court's discretion "where suit is brought by the IRS 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. 122 CONG. REC. S. 16430 (daily ed. Sept. 22, 1976).

37. *See supra* note 10 for a discussion of other statutes which provide for

no reference to harassment.[38]

Nevertheless, courts which looked to the legislative history of the amendment in applying it to tax litigation were inconsistent in their interpretations.[39] Some courts relied on the full legislative history and thus interpreted the simply-worded final amendment to address the problem of administrative harassment.[40] Other courts read the amendment as an attempt to provide all tax litigants equal access to the courts.[41] Two cases, *United States v. Garrison*[42] and *Patzkowski v. United States*,[43] exemplify the inconsistency of judicial interpretations of the amendment.

In *Garrison*, the taxpayer applied for an award of attorney fees, asserting that the company had been the subject of vexatious treatment by the IRS.[44] In response to the taxpayer's contention, the district court apparently focused on the legislative history of Senator Allen's rejected amendment, the one which dealt with administrative harassment.[45] The court held that it could award attorney fees where the taxpayer had been subjected to vexatious or harassing treatment. Additionally, the court found that proof of the common law bad faith exception to the American Rule was not necessary in order to invoke the statute.[46] In *Garrison*, the court found harassment and assessed $1,000 against the United States.[47]

Ignoring the harassment standard, the trial court in *Patzkowski* was convinced that the legislative history of the Act required proof of bad faith. On that basis the court rejected the taxpayer's request for an award of attorney fees.[48] The appellate court, however, reversed

---

an award of attorney fees and note 11 for the pertinent language of the Allen Amendment.

38. *See supra* note 11.

39. *See infra* notes 42-54 and accompanying text.

40. *See infra* notes 44-47 and accompanying text.

41. *See* Note, *Attorney's Fees*, *supra* note 12, at 64-66.

42. 77-2 U.S.T.C. ¶9705 (N.D. Ala. 1977).

43. 576 F.2d 134 (8th Cir. 1978).

44. The petitioner IRS issued a summons to the taxpayer for the production of the taxpayer's books and records. Garrison appeared with counsel before the IRS agent and declined to produce the records summoned because the company had previously made all such records available in connection with an audit of Garrison Construction Company, Inc.'s income tax return for the fiscal year ending June 30, 1976. The IRS petitioned the court to enforce the summons, but the taxpayer, relying on Section 7605(b) of the Internal Revenue Code, refused to comply. *Garrison*, at ¶9705.

45. *See supra* note 35.

46 *Garrison* at ¶9705. *See supra* note 2 for a discussion of the American Rule.

47. *Garrison* at ¶9705.

48. *Patzkowski*, 576 F.2d at 139.

and remanded the case because the district court had limited its analysis to the sole issue of governmental bad faith.[49] The appellate court noted, "The Act itself contains utterly no reference to bad faith on the part of the Government as a prerequisite for an award of attorney's fees to a prevailing taxpayer-defendant."[50] The court went on to analyze carefully the legislative history of the Act. In this analysis the court raised yet another area of confusion in regard to the Allen Amendment. In *Patzkowski,* the appellate court concluded that Congress had recognized that the standards to be applied in awards of fees to defendants were different from standards applicable to plaintiffs.[51] This decision stated that courts applying the Allen Amendment must consider requests by prevailing defendants pursuant to standards developed in the area of civil rights litigation.[52] The appellate court in *Patzkowski* concluded that Congress intended to give prevailing defendants in tax litigation as well as in civil rights litigation substantial relief through awards of attorney fees. The court specified that prevailing defendants could receive an award in two situations: first, in cases in which the government attempted to intimidate or overreach the taxpayer without cause or acted in a vexatious or harassing manner, and, second, in cases in which the government proceeded in bad faith.[53]

Significantly, the appellate court which considered *Patzkowski* noted that proof of the government's subjective bad faith, although

---

49. *Id.* at 135. The taxpayer in *Patzkowski* appealed from a denial of attorney fees in an action which resulted from his payment of a portion of an IRS penalty assessment. After IRS denied his claim for a refund, Patzkowski brought a refund suit. In this suit the government counterclaimed for the balance and also filed a third party complaint seeking to recover the same penalty assessment from another individual. A jury found the third party liable. The court entered judgment accordingly, granting Patzkowski his refund and dismissing the IRS counterclaim. *Id.*

50. *Id.* at 137.

51. *Id.*

52. *See generally* Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), which held that the court should not award attorney fees to the defendant under Title VII of the Civil Rights Act of 1964, unless the plaintiff's action was unreasonable or without foundation. The Court also gave its general approval to the criteria applied in United States Steel Corporation v. United States, 519 F.2d 359, 363 (3rd Cir. 1975), where fees were denied because the plaintiff's action had not been "unfounded, meritless, frivolous, or vexatiously brought." The Court noted that "meritless" is to be understood to mean groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case. Additionally, the court stated that the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him.

53. *Patzkowski,* 576 F.2d at 139.

a viable argument, was not an absolute requirement for the recovery of attorney fees.[54] Despite the appellate court ruling on the optional nature of the bad faith standard, the concept of administrative harassment thereafter disappeared from courts' analyses of the Allen Amendment and was replaced exclusively by the bad faith standard. In 1979 the Supreme Court based an award of $25,000 on its finding that the IRS had acted in bad faith when it misapplied payments made by the taxpayer.[55] Shortly thereafter in a case typical of district court decisions which followed, a lower court determined that an IRS counterclaim filed solely to intimidate an employee into testifying against her employer was an example of governmental bad faith.[56] The case contained no discussion of administrative harassment, reflecting the trend to forego that standard in favor of bad faith.

Also relying on the bad faith standard, in 1980, the Fifth Circuit so narrowly construed the Allen Amendment that its subsequent benefit to taxpayers was negligible.[57] In *Key Buick Co. v.*

54. *Id.*

55. According to In re Slodov, 79-1 U.S.T.C. ¶9215 (1979), attorney fees were awarded to a taxpayer, Slodov, who assumed control of three corporations and was subsequently assessed a one hundred percent (100%) penalty for failing to withhold employee wages and FICA taxes which were unpaid and dissipated by the prior corporation managers. After assuming control of the three corporations, Slodov had entered into an agreement with the IRS under which his payments would be applied to an outstanding trust fund liability. Despite the agreement, the IRS applied the payments to current non-trust fund obligations and sued Slodov for the trust fund liability.

56. In Bryant v. United States, 79-2 U.S.T.C. ¶9660 (E.D.Pa. 1977), the court determined that the government had instituted the suit solely for the purpose of securing Bryant's testimony against her employer, John Borden and Bros., Inc., which had a long history of making untimely payments of withholding taxes to the IRS.

57. In Jones v. United States, 613 F.2d 1311 (5th Cir. 1980), 80-1 U.S.T.C. ¶9291, the appellate court established guidelines which courts should follow in awarding fees under the Allen Amendment. The appellate court reversed a district court's denial of attorney fees to the taxpayer and characterized the government's action as "the epitome of a frivolous and unreasonable lawsuit." *Id.* at 1312. The appellate court awarded recovery of attorney fees to a logging contractor who was assessed $28.55 and $25.19 respectively for federal unemployment and Social Security (FICA) taxes for 1973 and 1974. The IRS concluded that wages paid to an employee were subject to those withholding taxes even though the IRS had proof in its own files that the defendant did not owe the taxes. After finding that the government's claim was meritless, the appellate court remanded the case to the district court for the award of attorney fees for both the trial and appellate level, consistent with the guidelines established in Johnson v. Georgia Highway Express, Inc. 488 F.2d 714, 717-719 (5th Cir. 1974). *See infra* note 212. Thus, other than suggesting specific guidelines for determining the amount of attorney fees which can reasonably be recovered, *Jones* did not significantly alter prior judicial interpretation of the Allen Amendment. However, *Key Buick*, 613 F.2d 1306 (5th Cir. 1980), decided by the same court on the same day, spelled the end of the statute's usefulness.

Commissioner,[58] the court reached an interpretation of the procedural requirements of the Allen Amendment which left the statute inapplicable to most taxpayers. The court used the doctrine of *ejusdem generis*[59] to interpret the words "civil action or proceeding" in the Allen Amendment.[60] Using *Federal Rule of Civil Procedure 2*[61] to interpret "civil action," the court cautioned that"proceeding" must not be expansively interpreted. The court found that "civil action or proceeding" meant litigation only and that the term did not include administrative proceedings.[62] After reviewing the legislative history of the Civil Rights Act, the court concluded that Congress may not have been aware that the Allen Amendment would have so little impact or practical implication.[63] This court held that in order for an award of attorney fees to be appropriate under the Allen Amendment, the government must be the initiating or moving party of the lawsuit.[64] The court reasoned that since the vast majority of tax litigation came either from Tax Court suits, which must be filed by a taxpayer, his transferee or his fiduciary, or from refund suits filed by taxpayers in district courts, most tax litigation was not encompassed by the Allen Amendment.

Under a literal interpretation of the Allen Amendment, a taxpayer became eligible for an award of attorney fees by satisfying three procedural requirements.[65] First, the taxpayer was required to be the prevailing party.[66] Second, the suit had to be a civil action or proceeding.[67] Third, the action had to have been brought by or on

---

58. 13 F.2d 1306 (5th Cir. 1980).

59. *The ejusdem generis* doctrine states that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind of class as those specifically mentioned. BLACK'S LAW DICTIONARY 464 (5th ed. 1979).

60. *See supra* note 11.

61. FED. R. CIV. P. 2 states, "There shall be one form of action to be known as 'civil action.'"

62. *Key Buick*, 613 F.2d at 1308. The court interpreted the language of the Allen Amendment to exclude administrative proceedings. The statute contained no reference to administrative proceedings. *See supra* note 11.

63. *Id.* at 1308-09.

64. Included among suits which the IRS typically initiates are Notices of Definciency and audits. The court interpreted "by or on behalf of the United States" to mean that the government had to initiate the action. *See supra* note 11.

65. Note, *The Fifth Circuit Curtails IRS Taxing Techniques*, 26 LOY. L. REV. 760, 763 (1980) (explains in detail the procedural aspects of the Allen Amendment).

66. *Id.*

67. *Id.*

behalf of the United States of America.[68] At the time courts were applying the Allen Amendment to tax litigation, the term "prevailing party" was considered self explanatory.[69] In regard to the second procedural requirement, *Key Buick* held that a civil action or proceeding meant only litigation.[70] Therefore, after *Key Buick* a taxpayer could not recover attorney fees in administrative proceedings before the IRS.[71] The impact of this decision is clear. After *Key Buick,* courts would no longer award attorney fees to successful plaintiffs in tax litigation based upon the Allen Amendment. Only in administrative procedures is the IRS the moving party. *Key Buick* squarely holds that fee awards could not be made either in administrative proceedings or in court actions where the government was not the moving party.[72] Therefore, tax litigants simply could not apply the Allen Amendment. If Congress wished to extend the opportunity for recovery of attorney fees to tax litigants, new legislation was necessary.

---

68. *Id.*

69. EAJA and TEFRA were conceived with more precise definitions of prevailing party. *See infra* notes 85-94 and accompanying text for EAJA interpretation and notes 180-184 and accompanying text for TEFRA definition of the term "prevailing party."

70. *Key Buick,* 613 F.2d at 1309.

71. After commentators suggested the limited applicability of the Act, Senator Allen commented on this concern:

> There is only one kind of tax disupte regardless of who is named plaintiff or a named defendant, or who is an appellant or an appellee, or who is an auditor or an auditee. A tax dispute is inherently a taxpayer asserting that he is not liable for a tax and the Government insisting that he is. The reasons of public policy which would make proper a discretionary award of fees are thus present or not present in a given tax controversy regardless of the formal position of the parties.

123 CONG. REC. 5732 (daily ed. Jan. 14, 1977).

Senator Allen remarked that he had intended the word "proceeding" to apply to administrative proceedings and audits. Of course, the Senator's remarks after the passage of the amendment could do nothing to alter actual legislative history of the Civil Rights Act. That the statutory language did prevent the recovery of attorney fees is reflected in the decision in a taxpayer's suit for refund in Richman v. United States, 477 F. Supp. 929, 933-934 (N.D. Ill. 1978). In dicta, the court noted:

> We regret that the language of the Act is not susceptible of the interpretation Senator Allen says he intended. In the instant case, we would be happy to award plaintiff attorney's fees if there were any basis for doing so . . . Unfortunately, there is no way for us to do so even though we agree with plaintiff's counsel that the statutory language compels an illogical, even ridiculous, result. The correction, however, rests with the Congress, not the courts.

72. *Key Buick,* 613 F.2d at 1308.

III. THE EQUAL ACCESS TO JUSTICE ACT

A. *Introduction*

Within the same year that *Key Buick* was decided, Congress enacted EAJA, which repealed the Allen Amendment to the Civil Rights Act by deleting reference to the IRS. Prior to the enactment of EAJA, courts had narrowly construed the Allen Amendment by consistently interpreting it to require that the taxpayer be the prevailing defendant.[74] Additionally, in applying the Allen Amendment, courts had awarded fees only in those cases in which the government position or behavior was frivolous[75] harassing[76] vexatious[77] unreasonable[78] or instituted in bad faith.[79] As a consequence of the narrow judicial construction and the application of the bad faith standard, the Allen Amendment was of little use to tax litigants. To overcome such stringent requirements for recovery of attorney fees, the drafters of EAJA not only specified that recovery was available to a prevailing party other than the United States but also allocated the burden of proof to the government to establish that its action was substantially justified.[80]

Congress recognized that prior to EAJA, the American Rule had discouraged and deterred litigation, particularly in suits against the government.[81] The costs of securing vindication of rights and the inability to recover attorney fees often precluded resort to the

---

73. 42 U.S.C. §1988 (1976) provided, "in any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of Title 42, Title IX of Public Law 92-318, or in 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*, or Title VI of the Civil Rights Act of 1964." (emphasis supplied to the portion of the section which ultimately led to the removal of that portion). *See supra* note 11.

74. The Allen Amendment also applied to a taxpayer subject to an IRS counterclaim. For an extensive discussion of court interpretation of the Allen Amendment, *see* Note, *Attorney's Fees*, *supra* note 12 at 66-70.

75. *See supra* note 2, for a variety of terms which courts have used to define bad faith.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (Supp. 1983).

81. Equal Access to Justice Act, 28 U.S.C. § 202 (a)-(c) (Supp. 1983) states:

> (a) The congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental actions because of the expense involved in securing the vindication of their rights in civil

adjudicatory process.[82] For example, if the cost of litigating an IRS order exceeded the amount involved, the taxpayer had neither a realistic choice nor an effective remedy. The only economically viable alternative was to comply with the IRS order whether or not it appeared substantially justified. Prior to EAJA in such cases it was more practical for the taxpayer to endure an injustice than to contest it.[83] Both the designation of prevailing party and the allocation of the burden of proof were contained within EAJA's general statutory exception to the American Rule.[84]

B. The Emerging Concept of Prevailing Party

EAJA does not limit the recovery of attorney fees to prevailing defendants only. Rejecting the dual standards which developed under the Allen Amendment, Congress provided that all prevailing litigants

---

> actions and in administrative proceedings. (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations. (c) It is the purpose of this title
>
> > (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

82. House Judiciary Committee, H.R. REP. No. 96-1418, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, 4984, 4988 (hereinafter cited as H.R. REP. No. 96-1418).

83. H.R. REP. No. 96-1418, 4989.

84. See *supra* note 1 for a discussion of the American Rule. The general statutory exception in EAJA provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Equal Access to Justice Act, 28 U.S.C. § 2412 (d)(1)(A) (Supp. 1983).

against the government could recover.[85] However, Congress did not define the phrase "prevailing party." By not specifically defining "prevailing party," Congress intended the interpretation of the term to be consistent with the definition as it had evolved under existing statutes.[86] As the law evolved through judicial interpretation, the term "prevailing party" was not limited to a litigant who emerged victorious after entry of final judgment following a full trial on the merits. For example, one who obtained a favorable settlement was considered prevailing[87] as was a party who had successfully sought a voluntary dismissal of a groundless complaint.[88] Further, a litigant need not have prevailed on all issues in order to be determined the prevailing party.[89] The legislative history of EAJA specified that a party could receive a fee award in a civil action prior to the losing party's completing its final appeal.[90] A litigant who prevailed on an interim order which was central to the case could also qualify as the prevailing party[91]

85. H.R. REP. No. 96-1418, at 4984, 4989.

86. H.R. REP. No. 96-1418, at 4990 discussed the development of judicial interpretation of the term "prevailing party." See *supra* note 10 for a discussion of other statutes which provide for an award of attorney fees.

87. Foster v. Boorstin, 561 F.2d 340, 341-342 (D.C. Cir. 1977) (a library employee who was granted a requested promotion after commencement of court action under the Civil Rights Act of 1964 but prior to judgment in the case was entitled to an award of attorney fees as the prevailing party). *See also* Maher v. Gagne, 100 S.Ct. 2570 (1980).

88. Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575, 576 (9th Cir. 1941) When a defendant in an action for infringement of copyright has been put to the expense of making an appearance and obtaining an order for the clarification of the complaint, and then the plaintiff voluntarily dismisses without amending his pleading, the defendant is the prevailing party within the spirit and intent of the Copyright Act. The defendant is the prevailing party under these circumstances even though she may at the whim of the plaintiff be sued again on the same cause of action. *Id.*

89. Bradley v. School Board of the City of Richmond, 416 U.S. 696, 722 (1974) (the language of the Emergency School Act, which in school desegregation cases allows the award of attorney fees to the prevailing party is not to be read to the effect that a fee award must be made simultaneously with the entry of a desegregation order, since many final orders may be issued in the course of such litigation. To delay a fee award until the entire litigation is concluded would work a substantial hardship on the plaintiffs and their counsel.) *See also* Hensley v. Eckerhart 103 S.Ct. 1933 (1983).

90. H.R. REP. No. 96-1418, at 4990.

91. Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.C. Cir. 1976) (the prevailing party is one who successfully prosecutes an action or defends against it and prevails on the main issue, even if not to the extent of his original contention. To be the prevailing party does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, the party who made the claim has maintained it.)

as could a victor subject to an interlocutory appeal on an issue that was significant and sufficiently independent to be considered a separate part of the case.[92] Of the various definitions of "prevailing party" perhaps the most significant to tax litigants while EAJA applied to tax cases was the determination that a taxpayer who received a favorable settlement as well as a taxpayer who did not prevail on all of the issues could be the prevailing party.[93] Likewise, a taxpayer who had not exhausted all IRS administrative remedies could still prevail.[94]

Thus, taxpayers could use the various definitions of the term "prevailing party" that had developed through court interpretation of earlier statutes. Using EAJA as the vehicle to recover attorney fees, a litigant who qualified as the prevailing party under any definition of the term, could then choose either the bad faith or the general statutory exception to the American Rule in applying for recovery.

C. Standards of Recovery: The General Statutory Exception Contrasted with the Bad Faith Exception

Under EAJA's statutory exception to the American Rule tax litigants in the appropriate courts who prevailed against the United States were entitled to an award of attorney fees and costs unless the government was substantially justified in its action or unless special circumstances prevailed which would have made such an award unjust[95] The legislative history of EAJA points out that this standard balances the constitutional obligation of the executive branch to ensure that the laws "are faithfully executed against the public interest in encouraging parties to vindicate their rights."[96] Thus, EAJA

92. Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974) (an interlocutory appeal is sufficiently significant and discrete to be treated as a separate unit. Therefore, the fact that Xerox prevailed on appeal qualified it as the prevailing party.)

93. H.R. REP. No. 96-1418, at 4990. This interpretation allowed taxpayers to recover expenses incurred in out-of-court settlements. Allowing such awards helps to discourage litigation, a factor important in Tax Court, where a backlog of cases is a significant problem.

94. In contrast to TEFRA, which specifically requires the exhaustion of administrative remedies precedent to the recovery of attorney fees in 26 U.S.C. § 7430(b)(2), EAJA contained no similar language. The policy in TEFRA may actually encourage litigation because only if a taxpayer files suit may he hope to recover attorney fees.

95. *See supra* note 81 and accompanying text.

96. H.R. REP. No. 96-1418, at 4989.

enabled taxpayers with limited financial resources to challenge IRS decisions in court and to recover expenses if, in fact, the IRS position lacked substantial justification.

The EAJA test of the substantial justification of a government action was one of reasonableness. Under EAJA's statutory exception, the government carried the burden of proof to show that its action was reasonable.[97] This allocation reflected Congress' belief that, as between the government and the taxpayer, the government, which had control of the evidence, could more easily prove the reasonableness of its action.[98] Of course, in those situations in which the government showed that its case was reasonable both in law and in fact, the taxpayer received no award. EAJA was never intended to allow the recovery of fees for every action brought against the government regardless of the government's position.[99]

The test of reasonableness under EAJA reflected a change from the standards under the Allen Amendment. Dual standards had developed under the Allen Amendment and other Civil Rights Acts because the courts had held that prevailing plaintiffs could ordinarily recover attorney fees unless special circumstances rendered an award unjust.[100] Courts had also decided that prevailing defendants could recover attorney fees only after a finding that the plaintiff's action was frivolous, unreasonable, or without foundation.[101] Legislators drafted the test under EAJA to include both prevailing plaintiffs and prevailing defendants in general litigation against the government.[102] In order to preclude similar erroneous interpretations, Congress replaced the vague language of the Allen Amendment with detailed specifications in EAJA.[103]

---

97. *Id.*

98. *Id.*

99. *Id.* at 4990

100. For example, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), pointed out that if Congress' objective had been to authorize the assessment of attorney fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for the bad faith exception would have applied. Thus, Congress purposefully shifted the burden of proof in the statutory exception to the American Rule in EAJA.

101. *See e.g.* Christianburg Garment Co., 434 U.S. at 421.

102. H.R. REP. No. 96-1418, at 4989.

103. Equal Access to Justice Act, 5 U.S.C. § 504 provides:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that Party in connection with that proceeding, unless the

In contrast to the lack of legislative history to assist courts in their interpretation of the Allen Amendment, the legislative history of EAJA specifies certain procedural situations which should warn the court that the government action was not substantially justified. The drafters explained that cases in which there was a judgment on the pleadings, a directed verdict, or a dismissal of a prior suit on the same claim illustrated unreasonable government action as anticipated by the drafters.[104] However, Congress noted that the reasonableness standard should not be interpreted to raise the presumption that the government lacked substantial justification in every case which it lost.[105] Furthermore, in tax cases the government was not required to prove that its decision to litigate was founded upon the substantial probability of prevailing against a taxpayer.[106] Finally, the clause "where special circumstances would make an award unjust" was written as a Congressional "safety valve."[107] The general language allowed the government to advance in good faith novel but credible extensions and interpretations of the law which could have promoted vigorous enforcement efforts.[108] Of course, any novel approach still had to be substantially justified.

Most tax litigants who sought an award of attorney fees under EAJA alleged that the government's action was not substantially justified. Typical of such suits is *United States v. Pomp.*[109] The court found that the IRS was not justified in attempting to collect from

---

adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

104. H.R. REP. No. 96-1418, at 4990.

105. *Id.* at 4990.

106. *Id.*

107. *See supra* note 81. *See also* H.R. REP. No. 96-1418, at 4990.

108. H.R. REP. No. 96-1418, at 4990.

109. 49 A.F.T.R. 2d ¶82-467 (M.D. Fla. 1982). The IRS had attempted to collect a 100% penalty of $57,071.79 on May 22, 1981. Pomp was able to prove that three years earlier the Appeals Division had found him not liable for the tax. The IRS voluntarily dismissed the claim, and Pomp recovered $5,175.50 in attorney fees.

Pomp a penalty which had been abated by the Appeals Division before the collection suit was begun.[110] Because the IRS could not go forward with evidence to establish substantial justification for its action against Pomp, the taxpayer recovered attorney fees.[111] Not only in collection suits such as *Pomp* but also in refund suits, taxpayers recovered fee awards against the IRS under EAJA. A district court awarded both a refund and attorney fees to a taxpayer after the IRS refused to refund money which it admittedly owed.[112] In this decision, the court interpreted the scope of EAJA by finding that the IRS posture not only during litigation but also in pre-trial actions must be substantially justified.[113]

In a tax assessment action a different district court again applied the reasonableness standard and held that the IRS was unreasonable in filing a case after the statute of limitation had elapsed.[114] Therefore, the court awarded the taxpayer attorney fees under EAJA.[115] Several other cases follow the same test of reasonableness.[116]

Predictably, not all applications for awards under EAJA were successful, often because the court found that the IRS took substantially justified action. In explaining its rejection of one such request, a Missouri district court acknowledged that substantial justification was a part of the reasonableness test but denied that an award of fees was justified simply because the government lost the case or even because the decision to litigate was not based on a substantial probability of prevailing.[117] In slightly different language, another court

---

110. *Id.*

111. *Id.*

112. Constantino v. United States, 50 A.F.T.R. 2d ¶82-5025 (E.D. Pa. 1981). The taxpayer filed a refund suit to recover $1,283.00 which the IRS had repeatedly refused to pay.

113. The court held that the IRS was unreasonable in not acting in response to its agreement to pay Constantino's claim for overpaid taxes. *Id.* at ¶82-5025.

114. United States v. Grabschied, No. 81 C 7174, slip op. (N.D. Ill. 1982) (available September 1, 1984, on LEXIS, Genfed libary, tax file).

115. *Id.*

116. *See, e.g.*, United States v. Rose, 549 F. Supp. 831, 832 (S.D.N.Y. 1982) (wording of the statute in regard to substantial justification should be given its plain meaning in the absence of a contrary indication in the legislative history); Falcone v. Commissioner, 535 F. Supp. 1313, 82-2 U.S.T.C. ¶9575, 50 A.F.T.R. 2d 82-5477 (E.D. Mich. 1982) (government's case must be unreasonable in order for plaintiff to recover fees); Spang v. Commissioner, 533 F. Supp. 220, 82-1 U.S.T.C. ¶9229, 49 A.F.T.R. 2d 82-1043 (N.D. Okla. 1982) (a successful recovery of fees after I.R.S. sought to retain a penalty assessment for an alleged failure to pay corporate withholding taxes).

117. Midwest Research Institute v. United States, 554 F. Supp. 1379, 1391 (W.D.

held that the prevailing party was not entitled to recover attorney fees incurred in resolving a dispute arising from a government breach of contract.[118] The court found that the government's conduct in litigating the issue was not reprehensible.[119] Although usually "reprehensible" has a more negative connotation than does "unreasonable," the court did not explain its word choice in upholding the substantial justification of the government's action.[120]

In addition to the substantial justification standard of the general statutory exception to the American Rule contained in EAJA, the Act also included within its language the bad faith exception to the American Rule.[121] The critical distinction between the bad faith and the general statutory exception to the American Rule provided by EAJA was the allocation of the burden of proof. The taxpayer had the burden of proof on the issue of bad faith.[122] If the taxpayer established that the government acted in bad faith, vexatiously, wantonly, or with oppressive behavior, the litigant became eligible for an award of attorney fees.[123]

Because of the difference in burden of proof from alleging bad faith or lack of substantial justification on the part of the government, the overwhelming majority of cases relied on the latter allegation.[124] However, in at least one case the taxpayers asserted that the government had acted in bad faith, vexatiously, wantonly or for

---

Mo., 1983); *accord*, Mary F. Kennedy v. U.S.A., 542 F. Supp. 1046, 82-1 U.S.T.C. ¶9290, 49 A.F.T.R. 2d 82-1327, (D.N.H., 1982).

118. Estate of Berg, 687 F.2d 377, 82-2 U.S.T.C. ¶13,486,50 A.F.T.R. 2d 148, 251, (U.S.Ct.Cl., 1982). In *Berg*, the IRS failed to redeem United States Treasury bonds at par value when they were tendered in payment of estate taxes.

119. *Id.*

120. *Id.*

121. Equal Access to Justice Act, 28 U.S.C. § 2412(c)(2) provides:

> Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

122. Courts have imposed a "stringent standard" in cases involving an allegation of bad faith and require that the persons seeking the award bear the burden of proof. 31 ALR Fed. 833, 839-41. *See infra* notes 121-127 and accompanying text.

123. *See generally* Natural Resources Defense Council v. E.P.A., 484 F.2d 1331, 1338 (1st Cir. 1973) (a review of decisions of the Environmental Protection Agency administrator approving portions of Rhode Island and Massachusetts air pollution implementation plans; sanctioned award of attorney fees).

124. *See e.g., supra* notes 107-118 and accompanying text.

oppressive reasons in two actions.[125] First, the IRS had required the taxpayers to litigate needlessly in order to sustain a clear right.[126] Second, the IRS had required the taxpayers to engage in duplicative litigation.[127] In a lengthy exoneration of the government's actions, the court refused the taxpayers' application for recovery of fees.[128] Had the plaintiffs sought to recover under the general statutory exception instead of the bad faith exception, the burden of proof would have been on the government and not on the taxpayers. Since the allocation of burden of proof can be determinative of the outcome of cases, possibly these litigants could have recovered had they chosen the alternative standard.

Although EAJA was not used as extensively as anticipated[129] the statute did further congressional intent. The legislature sought to encourage review of unreasonable government action by providing an award of attorney fees, expert witness fees, and other costs against the United States in certain situations.[130] As applied to tax litigants EAJA amended the Judicial Code to provide for such awards to the prevailing party in any civil tax action in the United States district courts or the Court of Claims whenever the IRS acted in bad faith or was unable to prove the substantial justification of its position.[131] To tax litigants the major drawback of EAJA was the Act's inapplicability in Tax Court.

---

125. United States v. Ernst & Whinney, 557 F. Supp. 1152, 1153 (N.D. Ga. 1983).

126. *Id.*

127. *Id.*

128. *Id.* The government's injunction against the taxpayers was dismissed for failure to state a claim of fraudulent practices. Therefore the taxpayers asserted that they had a clear right to recovery. The taxpayers sought to recover from the government $26,883.56, an amount spent for the preparation of exhibits, four volumes of photographs and documents which were submitted in opposing the government's motion for an injunction. Since the injunction action was dismissed, the taxpayer argued that the government's action was in bad faith and that the taxpayers should be compensated for the costs of the exhibits. However, the court did not find bad faith, and the taxpayers did not recover. *Id.*

129. *See infra* note 259 and accompanying text.

130. The legislative history of EAJA specifically states, "The section covers only adversary adjudications under 554 of Title 5 and not rulemaking or other administrative proceedings. In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable." H.R. REP. No. 96-1418, at 4992.

131. 28 U.S.C. § 451 lists the following courts: the Supreme Court of the United States, courts of appeals, district courts, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and any court created by Act of Congress where the judges are entitled to hold office during good behavior.

D. *EAJA's Inapplicability in Tax Court*

EAJA was available to litigants bringing actions in all courts defined in 28 U.S.C. § 451.[132] Therefore, EAJA applied to actions in United States district courts and the Court of Claims, but the statute did not apply to either state court proceedings or actions in the United States Tax Court. While EAJA still applied to tax litigation, a taxpayer could recover fees for expenses incurred in the litigation of any type of federal tax liability[133] as long as the action was initiated in an appropriate court. However, both IRS administrative proceedings and "on the record" agency hearings, which are subject to subsequent *de novo* trials in court[134] were outside the scope of EAJA. Consequently, EAJA's scope limited recovery to situations in which the taxpayer had to pay the tax prior to bringing suit and excluded recovery for some very costly yet unavoidable pre-trial procedures.

A significant judicial interpretation limiting the scope of EAJA to Article III courts appears in *McQuiston v. Commissioner*.[135] The taxpayers initiated this suit after they received a deficiency notice. Although the McQuistons were able to substantiate a number of disputed deductions, they could not reach a settlement because of a disagreement over the proper application of income averaging and net operating loss provisions.[136] After the Tax Court determined that

---

132. *Id.*

133. Although the Tax Court's jurisdiction is limited to deficiencies in income, estate, gift, and excess profits taxes by I.R.C. §§ 6212, 6213 and 7442 (West Supp. 1980), federal courts have jurisdiction for all types of federal tax liability cases. In choosing a forum, taxpayers have tended to select the Tax Court for deficiency cases and either the federal district courts or the Court of Claims for refund cases. L. KEIR AND D. ARGUE, TAX COURT PRACTICE 10, 25 (1970). A taxpayer who loses in Tax Court pays not only the additional taxes but also interest; furthermore, while EAJA still applied to tax litigation, the taxpayer could not recover attorney fees in Tax Court no matter what the outcome was. *Id.* In contrast, while EAJA applied to tax litigation, a taxpayer who selected as the forum for litigation either a district court or the Court of Claims and who won a refund in one of those courts was guaranteed the refund plus interest and a chance at recovering attorney fees as well. *Id.*

134. The definition in BLACK'S LAW DICTIONARY 392 (5th ed. 1979) of a *de novo trial* is a situation in which the matter is tried anew, the same as if it had not been heard before and as if no decision had been previously rendered. From this definition one may clearly reason that a prevailing party in an administrative hearing who stands to lose that status in a subsequent trial should not recover attorney fees until the matter is finally adjudicated.

135. 78 T.C. 807 (May 13, 1982).

136. *Id.*

the taxpayers had overpaid in 1967 and had no deficiency for 1968, the McQuistons filed an application for award of attorney fees alternatively under the Allen Amendment and under EAJA.[137] The Tax Court rejected the application under the Allen Amendment. In its rejection the court first cited the deletion of the language regarding the IRS[138] which clearly indicated congressional intent that cases arising under Internal Revenue laws be covered by the provisions of EAJA. The court then cited *Key Buick,* [139] which opposed an award of fees to plaintiffs other than the government in tax litigation.[140]

Addressing the McQuistons' alternative argument that they be granted attorney fees under EAJA, the court held that contrary to the taxpayers' allegations, the Tax Court did not fall within the definition of an agency which conducts adversary adjudications.[141] The McQuistons had argued that the Tax Court decision was an administrative review of an action of the Treasury Department, which is an agency of the United States.[142] McQuiston also asserted that the Tax Court acted as the adjudicative officer of the agency.[143] Alternatively, the taxpayers argued that they should recover attorney fees under Section 204(a) of EAJA, because they were in a federal court.[144] The Tax Court rejected this argument as well, holding that EAJA applied only to courts established under Article III of the United

---

137. *Id.*

138. *Id.*

139. *Key Buick*, 613 F.2d at 1306.

140. *Id.* at 1309.

141. *McQuiston*, 78 T.C. at 809. See *supra* note 103 for statutory reference to agency.

142. *McQuiston*, 78 T.C. at 809.

143. *See supra* note 103. EAJA allows an agency to award to a prevailing party fees and other expenses. The Tax Court held, however, that the courts of the United States are excluded from the definition of "agency." See also note 146 for a more detailed explanation of the statute.

144. *McQuiston*, 70 T.C. at 810-811. Equal Access to Justice Act ¶204. 28 U.S.C. § 2412(a) provides in part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

The taxpayer argued that the last phrase of this passage qualified them as being in an appropriate forum for an award.

States Constitution.[145] The Tax Court is an Article I court.[146] As precedent the Tax Court cited its decision in *Sharon v. Commissioner,*[147] in which it had held that the Tax Court was consciously excluded from EAJA.[148] The Tax Court stated explicitly that nothing in EAJA changed the results in *Sharon.*[149] Finally, the court in *McQuiston* pointed to congressional recognition that the Tax Court had no authority to award fees and costs[150] and to the many unsuccessful attempts to draft appropriate legislation to fill the void.[151]

Even though the Tax Court explicitly and thoroughly explained its holding in *McQuiston,* at least one taxpayer subsequently attempted to recover attorney fees after prevailing in Tax Court.[152] This attempt

---

145. 5 U.S.C. § 551(1)(B) (1981) excludes courts of the United States from the definition of "agency." For the purposes of 5 U.S.C. § 504(a)(1), "agency" carries the same definition as it does in 5 U.S.C. § 551(1)(B). The U.S. Tax Court was established as a court of the United States by section 7441 of the Internal Revenue Code of 1954 as amended by §951 of Pub. L. 91-172, 83 Stat. 487, 730. Therefore, litigation before the Tax Court does not fall within the purview of 5 U.S.C. § 504(A)(1).

146. *Id. See also* U.S. CONST. art. I, § 8, cl. 9, which states, "to constitute Tribunals inferior to the Supreme Court."

147. 66 T.C. 515 (1976).

148. 28 U.S.C. § 451 states that the term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by Chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

149. *McQuiston,* 78 T.C. at 812.

150. *McQuiston,* 78 T.C. at 812, n. 8.

151. The court referred to remarks of Rep. Kastenmeier, 127 CONG. REC. H. 9616 (Daily Ed. Dec. 15, 1981). Additionally the court listed eight unsuccessful legislative attempts during 1979 alone to draft bills providing for an award of attorney fees. From these rejected bills the court inferred that legislators could have so structured a piece of legislation as to encompass the Tax Court if they had chosen to do so. Perhaps other equally valid inferences could have been drawn. Thus far, research reveals no authoritative commentary, outside the judiciary, as to whether or not the Tax Court was purposefully excluded from coverage by EAJA. A persuasive argument that the drafters knew precisely the effect of their words stems from the strong governmental interest in protecting the Internal Revenue Service (IRS) so as to bring in as many tax dollars as possible. However, an equally strong counter argument is that the drafters of EAJA could not have intended to exclude the Tax Court since that forum in combination with the IRS represent the epitome of powerful government action against which private litigants are an unequal match. Since almost every citizen ultimately interacts with the IRS and since relevant litigation often proceeds in the Tax Court, to assert that legislators purposefully excluded this significant body of litigation is not a totally credible argument. See *supra* note 98 for the statutory language explaining the purpose of EAJA.

152. Bowen v. Commissioner, 706 F.2d 1087, 83-1 U.S.T.C. 9392, 52 A.F.T.R. 2d 83-5162 (11th Cir. 1983).

was equally as unsuccessful as was the effort in *McQuiston*.[153] Consequently, after these judicial interpretations of EAJA, taxpayers were again frustrated in their efforts to recover attorney fees in tax litigation. In spite of Congress' attempt to overcome the vague terminology of the Allen Amendment, by providing specific details in EAJA,[154] the courts interpretated the statute as inapplicable to the Tax Court.

E. Additional Statutory Provisions of EAJA

Even though EAJA was construed as being inapplicable to Tax Court, from the date of its passage until TEFRA removed all tax litigation from its authority, the many details of EAJA were relevant to tax litigants who chose an appropriate forum. Further, these details are still applicable to other areas of litigation and may again apply to tax cases if Senate Bill 919 or a similar provision is enacted by Congress.[155] The detailed provisions of EAJA include the limitations of net worth upon fee recovery, the application procedures, the award of fees to persons other than attorneys, and the appeal process.

First, under EAJA the litigant's net worth could determine that individual's ability to recover fees.[156] An individual whose net worth exceeded a certain amount simply could not use EAJA as a vehicle for fee recovery. The statutory limitations on net worth appeared to be part of a larger congressional plan to equalize the powers of the parties before the court. A wealthy individual or a large corporation could afford the extensive legal resources necessary to offset the legal powers of the federal government. The legislative history reflects Congress' intent to equalize the treatment of the federal government and other civil litigants by holding all parties to identical standards.[157] EAJA accomplished this equalizing purpose by permitting courts the

153. The court in *Bowen* raised no new issues in its decision. The court repeated the argument regarding Article III court and denied the application for fees. *See supra* note 148 and accompanying text.

154. See *supra* notes 81, 92, 103, 121, 144 and accompanying text for examples of the details in EAJA.

155. *See infra* notes 246 to 251 and accompanying text.

156. H.R. REP. No. 96-1418, at 4988. The two categories of litigants eligible to recover attorney fees under EAJA were individuals whose net worth is less than $1,000,000 and sole owners of unincorporated businesses, partnerships, corporations, associations, or other organizations whose net worth is less than $5,000,000. Two exceptions to the net worth ceiling are certain agricultural cooperatives, [Agricultural Marketing Act, 12 U.S.C. § 1141j(a) (1976)] and certain organizations exempt from taxation, [IRC, 26 U.S.C. § 501(a) and (c)(3)]. However, no business which employs more than 500 persons and which is involved in an administrative proceeding or civil court action in its capacity as a business may recover attorney fees.

157. H.R. REP. No. 96-1418, at 4987.

discretion to award attorney fees against the federal government based upon the same standards used to award fees against private litigants.[158]

Second, EAJA specified the particular application procedures for a prevailing party to recover an award. Here, as in the allocation of burden of proof, differences existed between the bad faith standard and the general statutory exception to the American Rule.[159] Under the standard where the prevailing party showed bad faith, the agency against whom the court granted the award paid the award in addition to any relief provided in the judgment.[160] The statute provided only that the court could award to the prevailing party reasonable fees and expenses of attorneys, in addition to costs.[161] Nowhere in this section of EAJA were those terms defined. If the taxpayer attempted to collect an award under the general statutory exception, EAJA made specific provisions regarding the award.[162] The taxpayer plaintiff had to allege that the position of the United States was not substantially justified.[163] Within thirty days of final judgment in the action, the taxpayer then had to submit to the court an application for fees and expenses which showed that the party prevailed and was thus eligible to receive an award.[164] The taxpayer also had to specify the amount sought complete with an itemized statement, from either the attorney or the expert witness, which listed the actual time spent and the rate at which fees or expenses were computed.[165]

Third, definitions specifically delineated a reasonable standard for the payment of expert witnesses, with the stipulation that no such witness could be compensated at a rate which exceeded the highest

---

158. Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys in addition to the costs which may be awarded in subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. *The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.*

8 U.S.C. § 2412(b) (Supp. 1983) (emphasis added).

159. Equal Access to Justice Act, 28 U.S.C. § 2412(c)(1) and (2) (Supp. 1983) contain the award provision for the bad faith standard.

160. *Id.*

161. *Id.*

162. Equal Access to Justice Act, § 204(a), 28 U.S.C. § 2412(d)(1)(B) (Supp. 1983).

163. *Id.*

164. *Id.*

165. *Id.*

rate paid by the United States.[166] EAJA also provided for an award for costs of any "study, analysis, test, or project found by the court to be necessary for the preparation of the party's case."[167] The statute additionally stated that reasonable attorney fees were limited to $75.00 per hour unless the court found that an increase in the cost of living or special circumstances justified a higher fee.[168]

Fourth, EAJA provided guidelines for both the appeal processes for litigants seeking an award of costs and fees.[169] In order to ensure uniform application procedures, EAJA required that each agency establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.[170] The statute further provided that the adjudicative officer could reduce the amount to be awarded, or even deny an award, if, during the course of the proceedings, the applicant "unreasonably protracted the final resolution of the matter in controversy."[171] Additionally, the statute required that the decision of the adjudicative officer be made a part of the record containing the final decision of the agency and also required written findings and conclusions as well as the reasons and bases for those results.[172]

During the time when EAJA applied to tax cases, a tax litigant who was dissatisfied with the fee determination made according to the specifications of the Act could petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decisions of the agency adversary adjudication.[173] However, if the court denied the applicant's petition, no appeal could then be taken from the denial.[174] Conversely, if the court granted the litigant's petition, the court could modify the determination of the award only if it found that the failure to grant an award or the calculation of the amount of the award was an abuse of discretion.[175] The various details of EAJA reflect the care the drafters took to avoid the judicial interpretations which ultimately led to the demise of the Allen Amendment. That certain facets of EAJA were not perfectly

166. Equal Access to Justice Act, § 204(a), 28 U.S.C. § 2412(d)(2)(A) (Supp. 1983).
167. *Id.*
168. *Id.*
169. Equal Access to Justice Act, § 203(a)(1), 5 U.S.C. § 504(c)(2)(a) (Supp. 1983).
170. Equal Access to Justice Act, § 203(a)(1), 5 U.S.C. § 504(c)(1) (Supp. 1983).
171. Equal Access to Justice Act, § 204, 28 U.S.C. § 2412(d)(1)(c) (Supp. 1983).
172. Equal Access to Justice Act, § 203(a)(1), 5 U.S.C. § 504(a)(3) (Supp. 1983).
173. *Id. at* § 504(c)(2)(a).
174. *Id.*
175. *Id.*

suited to the recovery of attorney fees in tax litigation is indicated by subsequent legislation changes which appear in TEFRA.[176]

IV. THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

A. *Introduction*

For sixteen months tax litigants recovered fees and costs according to the general statutory exception to the American Rule provided by EAJA. However, on March 1, 1983, TEFRA became effective, making it clear that Section 7430 of new Internal Revenue Code now supersedes EAJA in regard to tax litigation.[177] Therefore, prior to the repeal date set by the sunset provision of the attorney fee sections of both EAJA and TEFRA, tax litigants are bound by TEFRA recovery standards.[178]

B. *The Concept of Prevailing Party under TEFRA*

As is true under the general litigation costs award provision of EAJA[179] the taxpayer must be the prevailing party in order to recover fees under TEFRA.[180] The difference between the two statutes is that TEFRA specifically defines the phrase "prevailing party" as a party other than the United States or a creditor of the taxpayer who establishes that the position of the government is unreasonable and who substantially prevails in court with respect to the amount in controversy or with respect to the most significant issue or set of issues presented in the case.[181] The determination of who is the

---

176. *See infra* notes 177 to 199 and accompanying text.

177. 26 U.S.C. § 7430(a)(1) and (2) (Supp. 1983) provide:

(a) In General—In the case of any proceeding which is—

(1) brought by or against the United States in connection with the determinations, collection, or refund of any tax, interest, or penalty under this title, and

(2) brought in a court of the United States (including the Tax Court), the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such proceeding.

178. TEFRA is effective until December 31, 1985. The brief life of provisions for attorney fees awards may have been purposeful so that Congress might review their effects and operations.

179. *See supra* notes 82-91 and accompanying text.

180. *See infra* note 193 and accompanying text.

181. 26 U.S.C. § 7430(c)(A)(ii)(iii) (Supp. 1983) provides:

(A) In General—The term "prevailing party" means any party to any proceeding described in subsection (a) (other than the United States or any creditor of the taxpayer involved) which—

(i) establishes that the position of the United States in the civil proceeding was unreasonable, and

prevailing party may be made either by the court or by an agreement of the parties.[182] The legislative history of the Act does not facilitate judicial determination of the prevailing party because it does not clarify the relative importance of the amount in controversy or the significance of issues. Since TEFRA does define the term "prevailing party,"[183] presumably a court must rely on the statutory definition and not on law that had previously developed.[184]

C. *Allocation of Burden of Proof under TEFRA*

In addition to the differences in the Acts' stipulations regarding "prevailing party," another significant distinction between EAJA and TEFRA is that TEFRA clearly places the burden on the taxpayer to prove qualification for an award of attorney fees.[185] The taxpayer must bear the burden of showing that the IRS position is unreasonable. Committee reports indicate the criteria of reasonableness Congress envisioned.[186] In determining reasonableness, a court should consider whether the government used costs and expenses of litigation to extract from the taxpayer concessions which were not justified under the circumstances of the case.[187] A court should also determine whether the IRS pursued litigation out of any political motivation or from an intent to harass or embarrass the taxpayer.[188] The committee report

---

(ii)(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented.

(B) Determination As To Prevailing Party - Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made —

(i) by the court, or

(ii) by agreement of the parties.

182. *Id.* at (B)(i) and (ii).

183. The term "prevailing party" means any party to any proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty (other than the United States or any creditor of the taxpayer involved) which established that the position of the United States in the civil proceeding was unreasonable and which has substantially prevailed with respect to the most significant issue or set of issues presented. 26 U.S.C. § § 7430(a)(2)(A)(i), 7430(c)(2)(A)(i)(I)(II) (Supp. 1983).

184. *See supra* notes 83-89 and accompanying text.

185. 26 U.S.C. § 7430(c)(2)(A)(i) (Supp. 1983) states that the taxpayer has to establish that the government's position is an unreasonable one.

186. H.R. REP. No. 97-404, 97th Cong., 2d Sess. (1982) (hereinafter cited as H. REP. No. 97-404).

187. *Id.*

188. *Id.*

indicates that the court must also determine other relevant factors[189] in considering the reasonableness of the government's action. However, litigation to resolve conflict among the various circuits is not generally considered unreasonable[190] according to the legislative history of TEFRA. Unreasonableness must always be examined from the IRS's position during litigation;[191] a majority of courts have adopted this position under EAJA as well.[192]

D. TEFRA's Applicability in the Tax Court

In addition to the difference in allocation of burden of proof, a second important distinction between TEFRA and EAJA is that TEFRA applies to the United States Tax Court as well as to United States district courts, the United States Claims Court, and Bankruptcy Courts.[193] In these courts, TEFRA covers refund litigation, general litigation cases involving summons enforcement and collection suits[194] penalty refund suits[195] jeopardy assessment proceedings[196] and

---

189. *Id.* The Committee does not enumerate the other factors which courts should consider. Presumably, they might include such things as duplicative actions and refusal to tender refunds admittedly owed to the taxpayer.

190. *Id.*

191. *Id.*

192. In holding that the IRS position in pre-trial procedures must also be reasonable, the court made *Constantino* an unusual exception. *See supra* notes 112-113 and accompanying text.

193. 26 U.S.C. § 7430(a)(2) (Supp. 1983) specifically states that the section is applicable to any civil proceeding, "brought in a court of the United States (including the Tax Court)."

194. The source of authority for summons and collection suits is described as follows:

> The Commissioner, or any employee of the IRS whom he designates, has authority to issue summonses requiring production of books and records or testimony under oath by the taxpayer or others having knowledge of matters affecting his tax liability. This authority is derived by delegation from the Secretary of the Treasury, 25 FED. TAX COORDINATOR 2d (RIA) ¶V-3250.

195. Conflict among the circuits arose under EAJA in regard to refund suits, which are initiated in the district courts or the Court of Claims by the taxpayer rather than the government. Courts in California, Indiana, Oklahoma, and Tennessee held that there could be no recovery of attorney fees in refund suits under EAJA. 25 FED. TAX COORDINATOR 2d, (RIA) ¶V-1201. TEFRA resolved this conflict because the Act is applicable to all tax litigation. *See supra* note 177.

196. A jeopardy assessment suit is a drastic measure usually reserved for cases investigated by special agents covering racketeers and gamblers. However, a jeopardy assessment may also be used in audits of taxpayers who are subject to large damage suits or who have a record of past delinquency in tax payments involving potential criminal prosecution. A jeopardy assessment is an exception to the rule requiring notice

declaratory judgment actions involving revocation of a determination that an organization is tax-exempt.[197] However, expenses incurred in audit proceedings and appeals conferences are not recoverable.[198] Generally, TEFRA applies to all proceedings "in connection with the determination, collection, or refund of any tax."[199]

E. Other Statutory Provisions of TEFRA

In contrast to EAJA, TEFRA imposes neither a financial eligibility requirement nor an employee limitation as a recovery standard.[200] Significantly, though, TEFRA requires that the taxpayer exhaust administrative remedies as a prerequisite to recovering attorney fees.[201] Congress recognized the ever-increasing case load in the Tax Court as well as the importance of the administrative appeals

---

before assessment of a deficiency; the exception applied only when an IRS District Director believes that a delay will jeopardize assessing or collecting a deficiency. E. GOODRICH, L. REDMAN, & J. QUIGGLE, PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE 217-18 (1965).

197. I.R.C. § 501(c)(3) (1983). Although 26 U.S.C. § 7430 generally excludes declaratory judgments, it does provide for one exception:

> (4) Exclusion of Declaratory Judgment Proceedings —
>
> (A) In General—No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.
>
> (B) Exception For Section 501(c)(3) Determination Revocation Proceedings—Subparagraph (A) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

198. The IRS recognizes three types of audit, none of which is a court proceeding. The first type is an office audit conducted by correspondence between the service center or local IRS office and the taxpayer. The second type is an office audit conducted in person at the local IRS office. The third type is a field audit conducted usually at the taxpayer's place of business.

In those instances in which the taxpayer and examiner fail to settle a field audit case, the examiner prepares a full report for review by the district office staff. Subsequently, the taxpayer receives what the IRS calls a thirty-day letter, advising him that among other alternatives he may request an appeals conference by applying to the District Director. The taxpayer may also have to file a written protest with the District Director, who forwards all pertinent materials to the appellate division, from whom the taxpayer learns the time and place of the conference 24 FED. TAX COORDINATOR 2d (RIA) ¶T-1115 and ¶T-1601.

199. 26 U.S.C. § 7430 (Supp. 1983). *See supra* note 177.

200. *See supra* notes 157-159, regarding recovery standards under EAJA. No similar language appears in TEFRA.

201. I.R.C., 26 U.S.C. § 7430(b)(2) (Supp. 1983) states:

> Requirement That Administrative Remedies Be Exhausted—A judgment for reasonable litigation costs shall not be awarded under subsection (a)

process in the disposition of cases.[202] Therefore, because Congress did not wish to encourage taxpayers to forego the administrative process in hope of recovering litigation expenses, the legislators added the requirement regarding administrative remedies.[203]

Also, in contrast to EAJA which contained no maximum dollar amount which the court could award, TEFRA specifies that the amount of reasonable litigation costs which the court can award shall not exceed $25,000.[204] In further limiting the award of fees, TEFRA notes that multiple actions which could have been joined or consolidated or joint returns which could have been joined in one action are subject to only one award.[205] However, the Tax Court may award fees to an individual who is not an attorney as long as that person is authorized to practice before the Court.[206]

---

unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Services.

202. H.R. REP. No. 97-4961, 97th Cong., 2d Sess. (1983) (hereinafter cited as H.R. REP. No. 97-4961.)

203. *Id.* This provision can have the opposite of its intended effect, however, if taxpayers resist settlement during administrative hearings in the hope of recovering attorney fees in subsequent litigation.

204. 26 U.S.C. § 7430(b)(1) (Supp. 1983) states:

(b) Limitations—

(1) Maximum Dollar Amount—The amount of reasonable litigation costs which may be awarded under subsection (a) with respect to any-prevailing party in any civil proceeding shall not exceed $25,000.

205. 26 U.S.C. § 7430(d)(1)(2) (Supp. 1983) provides:

(d) Multiple Actions—For purposes of this section, in the case—

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single proceeding in the same court, such actions or cases shall be treated as one civil proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated for purposes of this section.

206. Any individual, whether plaintiff or defendant, may represent himself in any court. When a taxpayer knowingly and voluntarily exercises his right to appear *pro se* in the Tax Court, the court has no duty to insist that he be represented by counsel.

Attorneys are admitted to practice before the Tax Court without examination upon submitting a completed application and a clerk's certificate showing that they are members in good standing of the highest court of any state, territory, or the District of Columbia or of the Supreme Court of the United States.

Applicants other than attorneys are required to pass an examination given by the court. 24 FED. TAX COORDINATOR 2d (RIA) ¶U-1301 and ¶U-1303.

Reasonable litigation costs are specifically defined in TEFRA.[207] Costs include reasonable court costs and the reasonable expenses of expert witnesses in connection with the civil proceeding.[208] The court may also award reasonable costs for studies, analyses, engineering reports, and test projects determined by the Court as necessary for the preparation of the taxpayer's case.[209]

Unlike EAJA, TEFRA sets no hourly limit on the amount of attorney fees which a litigant may recover.[210] Neither does the statute specifically require an itemized account of the hours worked and services performed by the attorney. Since the statute contains no such limitations, reasonable attorney fees may be different for each attorney. A senior partner can be compensated at a higher rate than would a young associate, and different types of services may have different dollar values.[211] Case law suggests different standards, such

---

207. 26 U.S.C. § 7430(c)(1)(A)(i)-(iv) (Supp. 1983) discusses reasonable litigation costs as follows:

(c) Definitions—For purposes of this section—

(1) Reasonable Litigation Costs—

(a) In General—The term "reasonable litigation costs" includes—

(i) reasonable court costs,

(ii) the reasonable expenses of expert witnesses in connection with the civil proceeding,

(iii) the reasonable costs of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iv) reasonable fees paid or incurred for the services of attorneys in connection with the civil proceeding.

(B) Attorney's Fees—In the case of any proceeding in the Tax Court, fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court shall be treated as fees for the services of an attorney.

208. *Id.*

209. *Id.*

210. TEFRA establishes a maximum recovery of $25,000 but sets no hourly maximum. Although the Act does not mention hourly fees of tax attorneys, off-the-record interviews with tax attorneys consistently reveal that pervailing rates are well in excess of the $75 hourly limit set by EAJA.

211. Although "minimum" or "suggested" fee schedules which list customary fees for different legal services have come under attack by the Justice Department as violations of antitrust laws, *see infra* note 212 and *Fee Schedules on the Way Out*, 59 A.B.A.J. 1435 (1973), and are no longer published, off-the-record interviews with tax attorneys and consultants indicated that a well-qualified tax attorney's services are billed at $150.00 per hour. Assuming that these off-the-record figures are accurate, it is reasonable to deduce that Congress recognized the problems inherent in limiting the recovery of attorney fees in tax litigation to $75.00 per hour (as is true for EAJA), omitted an hourly limit, and imposed instead a maximum total limit.

as the ABA Code of Professional Responsibility[212] or the "Lodestar" approach.[213] That the courts will carefully monitor not only the granting of awards but also the amounts of awards applied for is apparent in an analysis of data available in regard to EAJA.[214] Comparable data for TEFRA have not yet been published as the Act has been in effect only since March 1983.[215]

A final provision of TEFRA specifies the appeal procedure. TEFRA makes clear that an order which either denies or grants an award for reasonable litigation costs shall be incorporated as a part of the decision or judgment and shall be subject to appeal in the same manner as would the decision or judgment itself.[216] A decision rendered in the Tax Court may be reviewed by the appropriate United States Court of Appeals[217] by filing a notice of appeal with the clerk of the Tax Court within ninety days after the decision is entered.

---

212. In *Johnson*, 488 F.2d at 717-19, the court alludes to the American Bar Association recommendation that the state and local bar associations withdraw or cancel schedules of fees. The court in *Johnson* then recommends several guidelines for use in determining an appropriate fee. The areas which the court suggested for consideration include: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

213. In Copeland v. Marshall, 641 F.2d 880, 891-902, (D.C. Cir. 1980), the court noted that a fee-setting inquiry begins with the Lodestar, the number of hours reasonably expended multiplied by a reasonable hourly rate. In exploring problems in calculating the Lodestar, the court discussed accurate documentation of hours worked, prevailing community standards for fees, the contingent nature of success in the lawsuit, and the quality of representation.

214. *See infra* note 259.

215. Telephone interview with Stanley Young, Administrative Office of the United States Courts (October 21, 1983).

216. 26 U.S.C. § 7430 (Supp. 1983) states:

> (e) Right Of Appeal—An order granting or denying an award for reasonable litigation costs under subsection (a), in whole or in part, shall be incorporated as a part of the decision or judgment in the case and shall be subject to appeal in the same manner as the decision or judgment.

217. The jurisdiction to review Tax Court decisions parallels the power of the circuit court in reviewing district court actions tried without a jury. 26 U.S.C. § 7482(a) (1976) provides that judgment of any such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon *certiorari* in the manner provided in 28 U.S.C. § 1254 (1976).

In regard to penalties for delay, TEFRA increases the amount which can be awarded to the United States from $500 to $5,000 and changed the words "merely for delay" to "primarily for delay."[218] An award of damages of up to $5,000 may also be made if the court determines that the taxpayer's position is frivolous or groundless.[219]

The legislative history of TEFRA reflects congressional awareness of and concern for both efficient tax administration and the backlog of cases pending before the Tax Court.[220] The House Ways and Means Committee expressed concern that any award of litigation costs might reduce a taxpayer's incentive to settle and increase his proclivity toward litigation.[221] The increase in damages which could be awarded for delay was thus coupled with the provision for awards of costs.[222]

While taxpayers have not recovered attorney fees under TEFRA, courts have used the penalty provision of the statute to grant awards to the government.[223] A number of courts have imposed a penalty when

---

218. 26 U.S.C. § 6673 (Supp. 1983). TEFRA language provides:
(b) Penalty For Using Tax Court Proceedings For Delay; Penalty For Frivolous Or Groundless Proceeding—The first sentence of section 6673 (relating to damages assessable by instituting proceedings before the Tax Court merely for delay) is amended to read as follows: "Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision."

219. FED. R. APP. P. 38 states that the courts of appeal may award "just damages and single or double costs to the appellee" if the court determines the appeal frivolous.

220. The committee was concerned with the ever-increasing caseload of the Tax Court and the impact that TEFRA would have on that caseload. Thus, the committee decided to limit the awarding of litigation costs to only those cases in which the government had acted unreasonably. Legislators believed that their action would reduce the incentive to avoid settlement and instead to pursue litigation in the hope of winning an award of litigation costs. In addition the committee decided to increase the damages or penalty that may be assessed against a taxpayer when proceedings are instituted for delay, and to expand the cirumstances under which the Tax Court may assess those damages. Because of the committee's concern for efficient tax administration and the backlog of cases pending before the U.S. Tax Court, the bill provided for a termination of the litigation costs provisions for cases filed after September 30, 1984, so that the Congress could review the operation and effect of the provision. WAYS AND MEANS COMMITTEE, H.R. REP. NO. 97-404, 97th Cong., 2d Sess. *reprinted in* PRENTICE HALL, HANDBOOK ON TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 798 (1982)(hereinafter cited as H.R. REP. NO. 97-404).

221. *Id.*

222. *Id.*

223. *See supra* note 235 and accompanying text.

the statutory grounds were met.[224] These courts have held that the cases were patently frivolous[225] groundless[226] and brought for purposes of delay.[227] In a recently decided case, the court referred specifically to the increasing caseload of the Tax Court in its decision to impose damages on the taxpayer.[228] While these cases illustrate the legitimate need to discourage frivolous suits, they also reflect a certain irony. TEFRA, theoretically enacted to provide a vehicle by which tax litigants could recover fees, has in reality been used to impose penalties.

F. Unsuccessful Attempts to Recover Fees under TEFRA

A review of cases involving the recovery of attorney fees during the first six months of TEFRA's existence indicates the difficulty the taxpayer faces under TEFRA's allocation of the burden of proof. Since TEFRA's enactment, no taxpayer has recovered attorney fees. In three cases, litigants in Tax Court attempted to recover under TEFRA, but in each case the suit was initiated before March 1, 1983, and therefore not incorporated under the aegis of TEFRA.[229] In deciding these three cases[230] the Tax Court predictably relied on *McQuiston*[231] in holding that the Tax Court had no jurisdiction and no statutory authority to award attorney fees. Equally predictably, in two cases the court was silent as to what its decision might have been given the upcoming statutory authority under TEFRA.[232]

In contrast, the Tax Court in the third case[233] after referring to lack of jurisdiction[234] took a strong stance in declaring that the cir-

---

224. Doyle v. Commissioner, 45 CCH T.C. Memo 410, December 27, 1982, and Beer v. Commissioner, 45 CCH T.C. Memo 401, December 27, 1982.

225. Brownie v. United States, 83-1 U.S.T.C. ¶9334, 51 A.F.T.R.2d 83-1088 (E.D.N.Y., March 29, 1983). The government sought corporate records in connection with the petitioner's tax liabilities for 1978-80. The petitioner alleged that the Tax Court had the jurisdiction to quash the summons under 26 U.S.C. § 7609, as amended by TEFRA.

226. Graf v. Commissioner, 46 CCH T.C. Memo 450, June 13, 1983.

227. *Id.*

228. Vickers v. Commissioner, 46 CCH T.C. Memo 833, July 25, 1983.

229. The effective date of TEFRA was March 1, 1983.

230. Crock v. Commissioner, 46 CCH T.C. Memo 464, June 15, 1983, Hill v. Commissioner, 45 CCH T.C. Memo 821, February 23, 1983, and Benson v. Commissioner, 45 CCH T.C. Memo 672, February 2, 1983.

231. *See supra* notes 135-152 and accompanying text.

232. *Crock*, T.C. Memo at 464 and *Hill*, T.C. Memo at 821.

233. *Benson*, T.C. Memo at 672.

234. The court cited *McQuiston*, 78 T.C. at 807, to show that EAJA would not pro-

cumstances described by the petitioner were not sufficiently egregious as to require detail or discussion.[235] Without saying that the facts of the case would not merit an award of fees under TEFRA, the court in *Benson v. Commissioner*[236] followed its declaration that the circumstances were not egregious by commenting that litigation commenced after February 28, 1983, would be governed by TEFRA.[237] The court clearly condoned the IRS pursuit of a taxpayer for a small amount of money, which the IRS ultimately admitted the taxpayer did not owe.[238] This government action required the taxpayer to engage counsel in preparation for a trial, which the IRS wished to abandon once it determined its error.[239] The triple irony is that the taxpayer had no recourse in Tax Court before March 1, 1983, that the taxpayer was deprived of his overpayment, and that the Tax Court determined that the IRS actions were not egregious. Even though a backlog of cases admittedly exists in the Tax Court[240] and the resolution of conflicts in administrative proceedings can potentially reduce the load of the Tax Court[241] the *Benson* case points directly to the heart of the concern: the tax litigant is at a distinct disadvantage in dealing with the IRS. Even if the taxpayer is clearly right and even if the amount at stake is small, the taxpayer must engage counsel at his own expense in order to defend his rights. Ultimately, recovery of

---

vide for recovery of attorney fees in Tax Court. *Benson*, T.C. Memo at 673.

235. *Id.* When the matter came to trial, the IRS conceded not only that no deficiency was due from Benson but also that Benson had made an overpayment of $174. Prior to trial Benson had refused to execute the decision document tendered by the IRS and had demanded his day in court in order to complain of alleged misconduct and to demand attorney fees and costs. Benson alleged that the IRS relied on hearsay supplied by the Social Security Administration in lieu of conducting its own review.

236. 45 CCH, T.C. Memo 672, February 2, 1983.

237. *Id.* The juxtaposition of the two comments may have been coincidental, or the Tax Court may have foreshadowed its future holdings. The second possibility has credibility since the decision came only three weeks before TEFRA took effect.

238. Benson asserted that he should be reimbursed $1,000 and further stated that the tendered concession of overpayment after the matter was set for trial was an inducement to him to forego bringing to the attention of authorities his allegations of official misconduct and personal mistreatment on the part of various IRS agents. The court found that the conceded overpayment was offered as a means of avoiding unnecessary time expenditure both of counsel and of the Court. Further, since Benson refused the tender and because a determination of overpayment cannot be based independently on any other evidence on the record, the Court declined to find an overpayment. *Id.*

239. *Id.* T.C. Memo at 672.

240. H.R. REP. No. 97-4961.

241. *Id.*

those expenses may often be impossible. The allocation to the taxpayer to bear the burden of proving that the government's position was not substantially justified is likely to determine the outcome of the case.[242] Thus litigants using TEFRA to recover attorney fees are less likely to succeed than those litigants who used EAJA primarily because TEFRA allocates the burden of proof to the taxpayer, whereas EAJA placed the burden on the government.[243]

The legislative history of TEFRA does not elaborate on Congress' primary purpose in separating tax cases from other litigation in which an award of attorney fees is allowed.[244] So many variables exist that any speculative effort is barely more accurate than a random guess.[245] Because any legislation which affects income taxes is a volatile issue in an election year, perhaps more insight about TEFRA may be derived from an examination of the legislation written to replace the expiring statute than from the legislative history of the Act itself.

V. RECOMMENDATIONS REGARDING SENATE BILL 919

Possibly because of the difficulty which taxpayers have had in recovering fees under TEFRA and certainly because the sunset provisions of both EAJA and TEFRA cause the costs and fees sections

---

242. M. GREEN, BASIC CIVIL PROCEDURE 93 (1972). Pragmatically it is easier to prove a positive fact than a negative one. It is easier for the government to prove the substantial justification of its action than it is for the taxpayer to establish the lack of substantial justification.

243. "The Taxing Act does not require the taxpayer to be an incorrigible optimist," declared the court in allowing a taxpayer to deduct as losses his stock in a German subsidiary when the German government took over the assets in 1918. United States v. S.S. White Dental Mfg. Co., 274 U.S. 398, 402 (1927). TEFRA does appear to require incorrigible optimists. Clearly, in conflict are the long-standing tradition that the taxpayer must bear the burden of proof in all challenges against the IRS and the more recent legislative purpose of equalizing the disproportionate power of the government when a private citizen wishes to vindicate a clear right. TEFRA represents the tradition; EAJA represents the more recent congressional purpose.

244. H.R. REP. No. 97-404.

245. The drafters may have been influenced by their knowledge of the judicial interpretations of both the Allen Amendment and EAJA and may have wished to write a statute which clearly specified that tax litigants could seek an award of fees in Tax Court. Alternatively, legislators may have recognized that tax litigants could not possibly recover their expenses under the maximum hourly award of EAJA and my have preferred to adopt a separate statute rather than making an exception to EAJA. Another possibility is that Congress intended to insulate the IRS from challenges by taxpayers and, therefore, purposefully allocated the burden of proof onto the litigant. This motivation could explain why the statute facially establishes a vehicle for the recovery fees, an appropriate gesture

to expire, legislators are currently considering Senate Bill 919.[246] This proposed legislation would permanently extend EAJA. Senate Bill 919 would also expand EAJA's coverage and bring tax cases back within its scope.[247] While the bill is replete with technical language and conforming amendments, nowhere does it state a legislative purpose. Simple statements of the plain meaning are essential if this legislation is to avoid the latent ambiguities of its predecessors.

The fatal flaw of previous fee recovery legislation was the judicial interpretation of the Acts as inapplicable to tax litigants.[248] TEFRA provided the specific language necessary to assure applicability to tax litigants but also allocated the burden of proof to the taxpayer.[249] This allocation is responsible for the current situation which frustrates taxpayers: technically, the opportunity for fee recovery exists, but, practically, litigants cannot successfully prove the unreasonableness of the government's action.[250] Taxpayers' lack of success may be due either to the allocation of the burden or to a general unwillingness of courts to find that the IRS acted in an unreasonable manner. Unless its language is altered, the legislation now before the Senate Committee on the Judiciary[251] may do little to improve taxpayers' opportunities to recover attorney fees and to equalize treatment to all litigants who seek an award of attorney fees against the government.

As currently written, Senate Bill 919 is a mere exercise in semantics. The legislation proposes to amend EAJA by striking various detailed provisions from the Act.[252] However, the drafters of the bill fail to include an explanation of their purpose in proposing these amendments. In addition to amending EAJA, Senate Bill 919 would repeal portions of three sections of EAJA.[253] Both the purposes and intended effects of these proposed changes need clarification.

---

for a statute with the word "equity" in the title, and subtly sets the standard so high that no one can collect, an action more in line with a conservative definition of "fiscal responsibility," other critical words in the statute's name.

246. S. 919, 98th Cong., 1st Sess. (1983).

247. *Id.*

248. In *Key Buick* the court found that the Allen Amendment could no longer be used to recover fees in tax litigation. *See supra* notes 58-72 and accompanying text.

249. *See supra* notes 185-192 and accompanying text.

250. *See supra* notes 229-243 and accompanying text.

251. *See supra* note 246.

252. S. 919, 98th Cong., 1st Sess. (1983) proposes to amend a net worth provision codified at 5 U.S.C. § 504 (Supp. 1983), references to agency awards codified in the same section, and a provision regarding agency officials codified at 28 U.S.C. § 2412 (Supp. 1983).

253. S. 919, 98th Cong., 1st Sess. (1983) call for the repeal of Sections 203(c), 204(c), and 207 of EAJA.

One commentator has suggested that the effect of the repeal of these three sections is to bring the Tax Court back within the scope of EAJA.[254] However, although Senate Bill 919 proposes to repeal subsection (c) of section 204 of EAJA, it was subsection (a) of section 204 to which the court in *McQuiston* referred in the pivotal decision which removed the Tax Court from the scope of EAJA.[255] To preclude future judicial reliance on *McQuiston,* Senate Bill 919 must also repeal section 204(a) of EAJA. Moreover, the bill must specify that its purpose in repealing section 204(a) is to allow the recovery of attorney fees in Tax Court. Revising Senate Bill 919 in this manner would ensure EAJA's applicability to Tax Court and therefore eliminate the major obstacle to tax litigants recovering fees under the Act. However, as long as TEFRA is effective, tax litigants still must bear the burden of proving that the government's action was not substantially justified.

The final provision of Senate Bill 919 would repeal, in its entirety, the attorney fee provision of TEFRA. While a repeal of TEFRA would remove a major obstacle to recovery, the allocation of the burden of proof to the taxpayer, it would also abolish the few potential benefits which TEFRA offers tax litigants. The most beneficial aspect of TEFRA which tax litigants stand to lose under Senate Bill 919 is the provision for a maximum amount recoverable rather than a maximum hourly rate.[256] However, the sacrifice of the maximum total award effected by a repeal of TEFRA is a small price to pay to accomplish the reallocation of the burden of proof.

The onus of TEFRA is the allocation of this burden. The brief history of TEFRA reveals that taxpayers have not recovered under the Act.[257] Since the most substantial difference between TEFRA and EAJA is the allocation of the burden of proof, a major cause of TEFRA's ineffectiveness is arguably this allocation.[258] Evidence ex-

---

254. *Litigation Focus*, 30 FED. BAR NEWS & JRNL. 379, 380 (1983).

255. *McQuiston*, 78 T.C. Memo at 810. The decision states:

Petitioners argue in the alternative that they should be awarded costs pursuant to 28 U.S.C. § 2412 (1981 ed.), 4 also amended by the Equal Access to Justice Act, Pub. L. 96-481, Title II, Section 204(a), 94 Stat. 2327 (effective Oct. 1, 1981). By virtue of 28 U.S.C. § 451 (1981), 5 Section 2412 only applied to courts established under Article III of the United States Constitution. . . . For purposes of Title 28, the United States Tax Court was consciously excluded from the definitions of a court.

256. *See supra* notes 204, 210 and accompanying text.

257. *See supra* notes 229-243 and accompanying text.

258. Other reasons may explain why taxpayers have failed to recover fees under this statute. TEFRA has not been in effect long enough for a well-developed body of case law to explain judicial interpretation of the statute's effectiveness.

ists to prove that EAJA was an effective vehicle for the recovery of fees.[259] No case law exists which shows the recovery of attorney fees under TEFRA. Because the burden of proof is critical, legislators should go beyond the repeal of TEFRA; they should specifically allocate the burden of proof to the government in all fee recovery cases, including tax litigation, as they extend EAJA's life.

Legislation designed to equalize treatment of all litigants who attempt to recover fees from the government would be more effective if the language were more specific. First, Senate Bill 919 should specifically repeal §204(a) of EAJA. Second, the bill should affirmatively state that EAJA applies to Tax Court litigation. Finally, the legislation should clearly reallocate the burden of proof to the government. These changes will enhance the possibility that the fourth legislative attempt to bring an award of attorney fees to tax litigants will ultimately accomplish that elusive goal.

CONCLUSION

Analyses of the legislative histories and the case law which developed under the Allen Amendment, EAJA, and TEFRA reveal

259. The Administrative Office of the United States Court publishes the number of and amounts of fees actually recovered under EAJA. The Congressional Budget Office projected that during the first year under EAJA all private parties (not just tax litigants) would win fee awards in about 3,000 court cases and 2,700 administrative cases and, therefore, estimated a budget of $69,000,000 for 1981-82. The actual awards disbursed have not approached the amount budgeted. Although only a relatively small number of applicants have actually recovered fees from the IRS under EAJA, records indicate that of all agencies covered only the Department of Health and Human Services exceeded the IRS in the number of recoveries made against it. However, since TEFRA removed all tax litigation from the scope of EAJA on February 28, 1983, the figures in the reports represent only the nine months of 1982 when EAJA applied to tax cases as compared to the full year of coverage of all other agencies.

According to the Administrative Office of the United States Court, from October 1981 until June 1982 thirteen parties won $683,518 in fees and costs in court cases. The Administrative Conference of the United States listed only one award of $21,120 in administrative proceedings granted during the first year that the law was in effect. The most recent report by the Administrative Office of the United States Courts indicates that 133 petitions for attorney fees and other expenses were filed in federal courts under EAJA during the year which ended June 30, 1983. More than sixty percent of the 133 requests were denied; in most cases the court determined that the government's position was substantially justified. Three petitions were filed in United States Claims Court for recovery of fees from the IRS; all were denied. In United States District Courts sixteen petitions were filed for recovery of fees from the IRS: of those sixteen petitions the courts awarded five, with a total of $82,607 actually recovered. In United States Bankruptcy Courts, one petition for recovery of

taxpayers' difficulties in recovering fees from the IRS. The vague language of the Allen Amendment ultimately resulted in judicial interpretation which so narrowed its applicability that it was virtually ineffective. The Allen Amendment was then repealed by EAJA, which was superseded by TEFRA.

A brief example highlights the differences between EAJA and TEFRA, which should be resolved before the statutes are re-enacted. In the early months of 1983 while EAJA still applied to tax litigants but before TEFRA was effected, a prospective tax litigant who faced what he considered an unreasonable or unjustified action by IRS had a choice. The taxpayer could have paid the tax and sued for a refund in either a United States District Court or in the United States Claims Court. This decision meant, first, that fee recovery was limited to $75 per hour but that no maximum limit was placed on the recovery. Second, and much more significant, was the fact that once the taxpayer prevailed, the government had the burden of proof to show that its position was substantially justified. Alternatively, this same potential litigant could have chosen to bide his time until after March 1, 1983, and, therefore, attempt to recover under TEFRA. This decision had the distinct advantage that the taxpayer did not have to pay his tax before filing suit since he could now hope to recover fees in Tax Court. A second advantage of TEFRA was that the taxpayer could potentially recover fees in excess of $75 per hour, but a $25,000 maximum recovery was imposed. However, most significantly, in order to recover, the taxpayer had to bear the burden of proving that the government's position was not substantially justified, a burden which has proved almost impossible to uphold.

Although this dilemma faced taxpayers for at most a few weeks in early 1983, the simple example clearly distinguishes certain provisions of EAJA and TEFRA. When Congress considers re-enactment of attorney fee recovery statutes this year, it should first articulate the intended purpose or benefit of the legislation to individual litigants. If the genuine purpose is to place all citizens on an equal ground with the government, Congress should allocate the burden of proof to the government in all fee recovery litigation. The obvious and equitable

---

fees was filed against the IRS and denied. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Report by the Director on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980*, 182-85 (1982); and REPORT BY THE DIRECTOR OF THE UNITED STATES COURTS ON REQUESTS FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT OF 1980, JULY 1, 1982 THROUGH JUNE 30, 1983 (William E. Foley, Director, September 23, 1983).

solution is to include both Article I and Article III courts under EAJA and to return to one standard of recovery for all litigants. These goals can be accomplished with plain language regarding the purpose and intended effect of future legislation. A clear statement of Congressional intent to treat taxpayers and all other litigants equally may also have an impact on the general hostility in courts toward fee awards against the IRS.

MARY ANN LINK