Fees for the Taxpaying Fool: I.R.C. Section 7430 Fee Awards to Pro Se Attorneys

Brett Barenholtz

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol38/iss3/5

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
Notes

FEES FOR THE TAXPAYING FOOL: I.R.C.
SECTION 7430 FEE AWARDS TO
PRO SE ATTORNEYS*

Congress has provided for court-awarded attorney fees when taxpayers prevail against an unreasonable government position. In McPherson v. United States, a district court recently awarded attorney fees pursuant to I.R.C. § 7430 in a taxpayer case where an attorney represented himself against the Internal Revenue Service. This decision is in direct conflict with the Tax Court's recent ruling in Frisch v. Commissioner on the same issue. This conflict over fee awards to pro se attorneys is only one aspect of the courts' failure to exploit fully the potential remedial effects of the statutory provision. Narrow and hypertechnical applications by some courts have imperiled the statute's viability. Other courts interpret section 7430 liberally in light of similar provisions. This Note analyzes section 7430 and the McPherson and Frisch decisions. The Author determines that congressional intent, judicial opinion and policy concerns favor a permissive reading of the statutory language, and concludes that court-awarded attorney fees to attorneys appearing pro se strengthen the statute's aim of responsible government conduct.

“He who is his own lawyer has a fool for his client.”  
Proverb

“A lawyer's time and advice are his stock in trade.”  
Abraham Lincoln

INTRODUCTION

THIS NOTE addresses the issue of whether an attorney, as a pro se litigant in a taxpayer suit against the Internal Revenue Service (IRS), is entitled to a fee award under Internal Revenue Code (I.R.C.) section 7430,¹ or whether such an award should be denied.

* This Note is dedicated respectfully in memory of Susan Ellen Frankel, Director of Admissions and Financial Aid, 1981-1988, Case Western Reserve University School of Law. The invaluable assistance of Professor Karen Nelson Moore in the development of this Note is gratefully acknowledged. E. Roger Frisch, Esq., and William V. McPherson, Jr., Esq., provided copies of pleadings for both sides in their respective cases.

¹. I.R.C. § 7430 (1982). Throughout this Note, reference is to the original version of section 7430 as enacted in 1982, unless otherwise specified. Pertinent parts of the statute are reprinted below. See infra note 44. Certain changes were made pursuant to the Tax Reform Act of 1986, and are discussed below. Those changes do not dramatically affect the analysis. See infra notes 83-85 and accompanying text. In any event, the unamended provision still applies to actions commenced prior to January 1, 1986. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1551(h), 100 Stat. 2085, 2753.
because the attorney is appearing pro se.\textsuperscript{2} In 1982, Congress amended the I.R.C. to permit court-awarded attorney fees to prevailing taxpayers under certain circumstances.\textsuperscript{3} Since the provision's enactment, courts have been generally ambivalent in awarding attorney fees. The absence of a consistent and forceful application by the courts is traceable to the lack of clear legislative intent, and the unique nature of tax litigation with its numerous forums.\textsuperscript{4} The United States Supreme Court has yet to clarify the confusion surrounding section 7430.\textsuperscript{5}

Recently, in Frisch \textit{v.} Commissioner,\textsuperscript{6} the Tax Court further restricted section 7430 awards by denying fees to an attorney who appeared pro se in a tax dispute. The decision was not appealed.\textsuperscript{7} Less than seven months later, however, in United States \textit{v.} McPherson,\textsuperscript{8} a federal district court awarded attorney fees under section 7430 to a pro se attorney. These decisions are in direct conflict with

\begin{itemize}
\item \textsuperscript{2} This Note discusses the limited issue of fee awards under section 7430 to attorneys appearing pro se, \textit{i.e.}, in their own behalf, as both counsel and litigant. As herein used, the term "pro se attorney" means a person licensed to practice law who represents himself in a legal matter to which he is also a party. \textit{Cf.} \textsc{Black's Law Dictionary} 118 (5th ed. 1983) (attorney-at-law defined). While statutory awards include all litigation costs, this Note deals with awards for legal fees only. For the purposes of this Note, the fee award is presumed to be valid under the statute in all other respects. \textit{See infra} notes 51-54 and accompanying text.
\item \textsuperscript{3} For a general discussion about fee awards under section 7430, see Langstraat, \textit{Collecting Attorney Fees from the Government in Tax Litigation: An Analysis of the Winners and Prospects for the Future,} 17 \textsc{St. Mary's L.J.} 395 (1986); for an analysis of section 7430 applicability, see \textit{Note, Section 7430 and the Award of Litigation Costs: A Reasonable Position,} 39 \textsc{Tax Law.} 769 (1986) [hereinafter Note, \textit{Section 7430}]; for an historical view, see \textit{Note, Award of Attorney Fees in Tax Litigation,} 19 \textsc{Val. U.L. Rev.} 153 (1984) [hereinafter Note, \textit{Award of Attorney Fees}]. The propriety of attorney's fee awards to non-attorney litigants appearing pro se is beyond the scope of this analysis. While certain similarities exist between attorney and non-attorney pro se litigants, the two are distinguishable. A fee award to a pro se attorney does not imply one to a pro se non-attorney, nor does a denial to the latter prohibit an award to the former. For a general analysis of statutory fee awards to pro se litigants, see \textit{Note, Awarding Attorneys' Fees to Prevailing Pro Se Litigants,} 80 \textsc{Mich. L. Rev.} 1111 (1982) [hereinafter \textit{Note, Pro Se Litigants}]; \textit{Note, Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants,} 34 \textsc{Stan. L. Rev.} 659 (1982).
\item \textsuperscript{4} \textit{See infra} notes 51-54 and accompanying text. Ordinarily, in tax litigation, one party is the taxpayer, and the other is the United States government, represented by the Internal Revenue Service. Reference is made interchangeably to both; for purposes of this Note, no distinction is intended.
\item \textsuperscript{5} \textit{See infra} notes 207-19 and accompanying text.
\item \textsuperscript{6} \textit{See infra} note 199.
\item \textsuperscript{7} 87 T.C. 838 (1986).
\item \textsuperscript{8} The petitioner's fee request was incidental to exoneration on the disputed tax issue. Further litigation after an already protracted ordeal was not a pleasant prospect. The decision not to appeal is understandable. Telephone interview with E. Roger Frisch (Oct. 14, 1987).
\end{itemize}
one another, and the resolution of this conflict will have a significant impact on two broader aspects of fee awards, namely, the intended scope of I.R.C. § 7430 and the propriety of statutory fee awards to pro se attorneys. Furthermore, that resolution may be imminently forced upon the courts as the IRS is currently appealing the McPherson order.9

This Note analyzes the Frisch and McPherson opinions in light of congressional intent, judicial treatment of fee awards in other contexts, and policy considerations. This Note recommends that an award of fees to a pro se attorney in a taxpayer case is consistent with section 7430 and that a denial in such cases undermines the integrity of fee award statutes.

I. THE CONFLICT

A. The Frisch Case

On October 28, 1986, the United States Tax Court filed its opinion authored by Judge Parr in Frisch v. Commissioner.10 In Frisch, the IRS determined that, on their 1979 tax returns, Mr. and Mrs. Frisch incorrectly claimed a $6,000 charitable deduction for the donation of a Norman Rockwell print to Bates College.11 The IRS maintained that the print, purchased in 1974 for $1,150, was worth only $500 when donated.12

[Respondent] relied on an appraisal which was thoroughly discredited at trial [and] erroneously implied that prices fell after Rockwell's death [in 1978] when in fact they rose precipitously. It also omitted higher-priced comparables, indicating Rockwell's paintings sold at between $4,250 and $9,000, when sales prices really ranged from $4,250 to $65,000.13

In holding for the taxpayer on the merits, the unanimous court was "convinced [the IRS] was alerted to these defects, [but] consistently adhered to a trial strategy designed to persuade [Frisch] to capitulate despite the merits of the case."14

Mr. Frisch filed a motion for "reasonable litigation costs" under section 7430, which "provides, in pertinent part, that a taxpayer who has substantially prevailed in a civil tax proceeding may be

---

10. 87 T.C. 838 (1986).
11. Id. at 839.
12. Id.
13. Id. at 840.
14. Id. at 841 (emphasis in original).
awarded a judgment for reasonable litigation costs if he establishes that respondent’s position in the proceeding was unreasonable.”15 The Tax Court held that petitioner Frisch had met the requisite terms of the provision.16 The Tax Court unequivocally condemned the behavior of the IRS as resoundingly unreasonable.17

However, the Tax Court, in a lengthy discussion, refused to award “reasonable fees paid or incurred for the services of attorneys” because of Frisch’s pro se status as both litigant and attorney.18 As “an issue of first impression under section 7430,”19 the Tax Court reasoned that no attorney fees were “paid or incurred” by the petitioner within the meaning of the statute,20 and thus there was no monetary liability created as required “by the plain language of the statute.”21 Furthermore, the court argued that the plain language also required that the fees be for an attorney—“an agent for another.”22 “Without the ‘other’ there can be no attorney, merely a pro se litigant who happens to earn a living as a lawyer. At any given time, [Frisch] can be a pro se litigant or an attorney, but not both.”23 The Tax Court relied on legislative history which contained the adjective “actually” in the same passage as “incurred.”24

The Tax Court’s review of fee awards under other statutory provisions was random and incomplete. Citing from decisions “of questionable precedential value,”25 the court utilized some arguments while rejecting or ignoring others.26 Apparently, it was satisfied that the plain language of I.R.C. §7430 provided ample support for a denial of an otherwise awardable fee to a pro se attorney.27

B. The McPherson Case

On May 13, 1987, Chief Judge Hiram H. Ward of the United

15. Id. at 840.
16. For a discussion of the section 7430 requirements, see infra notes 51-54 and accompanying text.
17. 87 T.C. at 840-41.
18. See id. at 841-47. Petitioner’s request for court costs and an expert witness fee was granted since “actually paid or incurred.” Id. at 847.
19. Id. at 842.
20. Id. at 846-47.
21. Id. at 846.
22. Id.
23. Id.
24. Id. See infra notes 74-81 and accompanying text.
25. 87 T.C. at 843.
26. Id. at 843-46. See infra pp. 422-39.
27. 87 T.C. at 845-46.
The case involved a government action, filed August 14, 1984, to recover $9,149.37 from the defendant. Mr. McPherson had been previously appointed by a North Carolina state court to act as receiver for a debtor's assets. The state court had required that the amount in question be deposited with the court's clerk. Despite full knowledge of these facts, the IRS had sought to hold Mr. McPherson personally liable under the Federal Tax Lien Act of 1966. The district court dismissed the government's claim under a federal regulation expressly stating that "[t]axes cannot be collected by levy upon assets in the custody of a court." The government voluntarily dismissed its appeal of the district court's dismissal on June 25, 1986.

The defendant then sought to recover attorney fees from the government. After negotiation with the government regarding settlement of the fee dispute proved fruitless, Mr. McPherson filed his Motion for Award of Costs and Attorney's Fees on February 13, 1987. The district court granted the motion and awarded the requested fees to the pro se attorney under section 7430. The court's inquiry focused solely on whether a pro se attorney qualifies as an attorney.

The government relied on Frisch and argued that "[congressional] purpose to remove the obstacles of litigation expenses, in-
cluding attorneys’ fees . . . is not furthered by allowing an attorney an award of fees when he has proceeded pro se and more importantly the wording of the Statute does not allow an award of fees which have not been ‘paid or incurred.’”\(^3\) The court rejected this rationale as “unpersuasive.”\(^3\) Rather, it held that:

an individual can be both a pro se litigant and an attorney. In this case defendant ably [and successfully] advocated his case . . . . Moreover, defendant did incur fees for legal services. As Abraham Lincoln once said, “A lawyer’s time and advice are his stock in trade.” Clearly, defendant “paid” for his services by foregoing other opportunities for 97.8 hours of his time to defend himself against the government’s baseless claims.\(^4\)

The government filed an appeal of the award on July 13, 1987 in the United States Court of Appeals for the Fourth Circuit.\(^4\)

The two courts have reached opposite conclusions about the propriety of fee awards to pro se attorneys. The conflicting opinions reflect the differing concepts behind statutory fee awards. A denial of fees to a pro se attorney vindicates an economic rationale for statutory fee awards, while an award of such fees embraces a punitive and deterrent motive behind such awards. In most contexts, both viewpoints will support an award of fees.\(^4\)\(^2\) However, the pro se attorney provides the exception that proves the rule. If section 7430 is understood primarily to address the express monetary cost of engaging an attorney’s services, pro se attorneys cannot easily justify statutory fee awards, since no actual payment for an attorney’s services are involved. However, if section 7430 is meant to remedy wrongful conduct, no victim of such conduct should be excluded from the statute’s scope. Consequently, the resolution of this conflict will have a substantial impact on the entire area of statutory fee awards. Thus, it is important to understand the basis for section 7430 in order to determine its applicability to pro se attorneys and the subsequent validity of the Frisch and McPherson decisions.

---


\(^{39}\) 660 F. Supp. at 300.

\(^{40}\) Id. (emphasis in original; footnote omitted).

\(^{41}\) See supra note 9.

\(^{42}\) Litigation is usually conducted by attorneys for non-attorney litigants. Such an arrangement usually means that the litigant pays for the attorney’s services. If the court views section 7430 as punitive, in cases where the government has misbehaved, punitive fees are assessed, and the litigant is reimbursed incidentally. If the court opts for a remunerative view, fees are awarded to reimburse the litigant, and the government is indirectly reprimanded. The result in either instance remains identical.
II. THE STATUTE

The Frisch and McPherson cases presented each court with the same question: In the absence of explicit legislative directive or binding judicial precedent, should section 7430 permit the award of attorney fees to a pro se attorney? A meaningful answer requires judicial construction of the statute based on three factors: congressional intent, judicial treatment and policy considerations. Due to the constraints of the judicial process, neither court had the opportunity to adequately address all sides of the issue. Therefore it is necessary here to explore each element of pro se fee awards under section 7430. This section of the Note scrutinizes the elements of statutory construction to evaluate the statutory interpretations developed by the two opinions.

A. Congressional Intent

In 1982, Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA).\(^\text{43}\) The Act provided for fee awards to prevailing taxpayers under certain circumstances by adding section 7430 to the Internal Revenue Code.\(^\text{44}\) Previously, fee awards had been


\(^{44}\) TEFRA § 292(a), I.R.C. § 7430 (1982). Prior to 1986, the relevant portions of section 7430 read as follows:

(a) IN GENERAL. — In the case of any civil proceeding which is —

(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under [the I.R.C.], and

(2) brought in a court of the United States (including the Tax Court and the United States Claims Court),

the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such a proceeding.

(b) LIMITATIONS. —

(1) [$25,000 maximum award]

(2) REQUIREMENT THAT ADMINISTRATIVE REMEDIES BE EXHAUSTED. — A judgement for reasonable litigation costs shall not be awarded under subsection (a) unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

(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) [expert witness fees],

(iii) [costs for prepared materials], 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
allowed in tax litigation (brought in article III courts only) under section 2412 of the Equal Access to Justice Act (EAJA) since that legislation was passed in 1980. Although there is little legislative history available, Congress seems to have expressed a specific concern about the special nature of tax litigation as opposed to other governmental litigation. The tax area uniquely provides individual monetary incentive for litigants to pursue claims against the government. Also, the broad regulatory powers of the IRS require a certain deference and autonomy to insure the integrity of our taxation system. Furthermore, tax issues rarely evolve around factual disputes. Thus, Congress wanted to provide special rules to govern all fee awards in taxpayer cases.

These special rules require that fee awards be allowed only to (1) a prevailing taxpayer, (2) who has exhausted all alternative (administrative) channels, (3) where the IRS maintained an unreasonable position. These rules serve well to limit awards to bona fide claimants, and to prevent the government from being penalized authorized to practice before the Tax Court shall be treated as fees for the services of an attorney.

(2) Prevailing Party.

(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

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

(iii) 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 prevailing shall be made —

(i) by the court, or

(ii) by agreement of the parties.


47. The bottom line in almost all tax disputes is the dollar amount: taxpayers argue that it is too much; the IRS argues that it is not enough.

48. Schmalbeck & Myers, supra note 46, at 986-87, 1001; Note, Award of Attorney Fees, supra note 2, at 187.

49. A tax dispute is most likely to focus on which rule applies and/or how it applies to a given fact situation, rather than what situation.

50. Note, Award of Attorney Fees, supra note 2, at 156.


after every lost case. Together, they suggest a legislative intent to vindicate those taxpayers who are abused by the tax system, by allowing them to recover litigation costs that resulted from unreasonable government behavior. A further goal achieved by the provision is the check it provides on the broad discretion of the IRS. The Executive and Legislative branches do not provide the most adequate check, since the IRS is relatively autonomous. The taxpayers, through the courts, provide an important watchdog function. If the IRS is assessed attorney fees for pursuing unreasonable claims, more responsibility is likely to be shown in the exercise of its discretion.

The threshold question is whether the plain language of the

54. See Langstraat, supra note 2, at 399; Schmalbeck & Myers, supra note 46, at 980.
55. H.R. REP. No. 404, 97th Cong., 1st Sess. 10, 11 (1981). The House and Senate held numerous hearings in 1979 and 1980 to consider various bills proposing statutory fee awards in taxpayer cases, which were the unsuccessful antecedents of section 7430, passed two years later in 1982. The testimony throughout these hearings reflect an ongoing preoccupation with the need for a punitive and deterrent fee award to check IRS abuses. Additionally, from 1975 through 1980, Congress held several hearings on statutory fee awards, acquainting the legislators with the vast array of provisions enacted to date. Thus, these hearings provide further support for the suggestions in this section of the Note that (1) Congress intended a punitive and deterrent purpose behind section 7430, and (2) all statutory fee provisions are interrelated. See Recovery of Attorney's Fees in Tax Cases: Hearings on S. 752 & S. 1673 Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance, 97th Cong., 1st Sess. (1981) (The Chief Judge of the Tax Court instructed that "[t]he Congress will also need to consider whether, and by what measure, fees should be awarded to pro se taxpayers." Id. at 46 (statement of Chief Judge Theodore Tannenwald, Jr.).); Payment of Attorneys' Fees in Tax Litig.: Hearing on H.R. 4584 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways & Means, 96th Cong., 2d Sess. (1980); Procedural Difficulties Encountered by Smaller Business in Dealing with the IRS: Hearings Before the Subcomm. on Tax'n, Financing and Investment of the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980) (A fee award provision is offered as an effective weapon against IRS abuses.); Award of Attorneys' Fees Against the Federal Gov't: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (1980) (Federal statutes that authorize awards of attorneys' fees are listed, quoting exact language. Id. at 611.); Taxpayer Protection and Reimbursement Act: Hearings on S. 1444 Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Fin., 96th Cong., 1st Sess. (1979) (The potential problem of pro se parties was mentioned by the acting deputy assistant attorney general of the tax division, but not resolved. "Perhaps the legislative history will cover this situation of pro se taxpayers, taxpayers who represent themselves, and the extent, if any, that they would be entitled to remuneration under this provision." Id. at 27 (statement of John Murray.).); The Awarding of Attorneys' Fees in Fed. Courts: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. (1977 & 1978); Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975).
56. See supra note 48.
57. Schmalbeck & Myers, supra note 46, at 975, 981.
statute permits a fee award to a pro se attorney.\(^{58}\) However, unless Congress explicitly legislates that fee awards to pro se attorneys are allowable (or disallowed), one must decide whether the award is consistent not only with what Congress said, but also with what it intended. The pivotal language of section 7430 is "reasonable fees paid or incurred for the services of [an] attorney[]."\(^{59}\) The Frisch opinion defines "paid or incurred" and "attorney" to require client (taxpayer) liability for payment to an attorney.\(^{60}\) This is far from truistic.\(^{61}\) Even if it were self-evident, as the Tax Court seems to believe,\(^{62}\) a second inquiry is required: Is the result contrary to the statute's intended effect? Furthermore, unless the language is express, the initial inquiry of whether it implicitly permits a fee award to a pro se attorney is related intimately to the second one. What, then, did Congress intend?

While Congress has offered no direct guidance about fee awards to pro se attorneys, the focus of statutory fee award provisions is compensation for all legal expenses, necessitated by unacceptable government behavior.\(^{63}\) Recompense serves as a remedy for the aggrieved citizen, as a punishment for the errant government, and as a deterrent against future government misconduct.\(^{64}\) An award of attorney fees encourages the use of legal talent to challenge highhanded government behavior.\(^{65}\) Thus, where fees would be awarded to a citizen who hired an attorney, denial on the grounds that an attorney appeared pro se, deprives the attorney of payment for services similar to those rendered by the hired attorney and identical in result achieved, and thus provides a windfall for the government.\(^{66}\)

The specific restrictions on awarding attorney fees under section 7430 target reprehensible government conduct demonstrated by an


\(^{60}\) 87 T.C. at 846.

\(^{61}\) See infra notes 180-86 and accompanying text.

\(^{62}\) 87 T.C. at 845.


\(^{65}\) See, eg., Duncan v. Poythress, 777 F.2d 1508, 1513 (11th Cir. 1985) (the concern of the promulgated statutes is that by using legal counsel—as opposed to pro se laymen—the effectiveness of the legal system will be enhanced).

\(^{66}\) Id. (level of competency with which pro se attorney complaints are prosecuted not rewarded to same degree as litigants who necessarily hire outside counsel). The desired use of effective legal counsel is achieved, but not rewarded. No remedy or punishment results from government misconduct, nor is it thereby deterred.
unreasonable IRS position and a substantially prevailing taxpayer. 67 Once established, such conduct remains reprehensible regardless of whether the taxpayer has hired an attorney, or a taxpaying attorney has appeared pro se. However, in the latter instance, under the Frisch opinion, the government escapes the punitive and deterrent assessment of fees that otherwise would have been exacted. This is contrary to the congressional intent that section 7430 have significant punitive and deterrent effects.

While another indisputable purpose of awarding litigation costs is to remove any economic barriers to taxpayers with valid causes of action who might otherwise be deterred by prohibitive legal expenses, 68 it cannot be considered the sole or primary legislative motivation. 69 Assuming arguendo that the sole motivation of Congress was removal of economic barriers, it is hardly conceivable that legislators of the statute, a substantial number of them lawyers, 70 believed that the efforts of a victorious pro se attorney are of a fundamentally different and lesser character than those of a victorious attorney hired by a litigant. Yet denial of fees to a pro se attorney sets the value of the pro se attorney's services at zero, while the same attorney's services performed for another taxpayer would per-

---


69. First, if financial need were the sole motive, it would govern any fee award. Second, the legislative history indicates that increased litigation is a serious concern. Note, Section 7430, supra note 2, at 772. A pure economic purpose to facilitate access to the courts would result in additional cases, brought by those without means. A dual purpose to encourage only those cases where the IRS position is unreasonable and to penalize the IRS for that position will deter government misconduct and provide the taxpayer a remedy. H.R. REP. No. 404, 97th Cong., 1st Sess. 10, 11 (1981). Third, since taxpayer litigation involves pecuniary stakes in virtually all instances, the need for an incentive is not as strong as it is in areas such as civil rights where little monetary dispensation exists. Taxpayers are likely to pursue large claims, whether or not they will be awarded fees. Thus, there is a smaller risk that a fee award statute will be abused through increased litigation. When the IRS acts unreasonably, a proper award of fees will deter similar behavior in the future, obviating further litigation.

70. The Ninety-Seventh Congress, which legislated the TEFRA provisions, was composed of 200 lawyers in the House of Representatives and 61 lawyers in the Senate. Thus, over 48% of the Congress were lawyers. Moreover, 32 of the 54 legislators appointed to the House Ways and Means and Senate Finance Committees were lawyers. Thus, over 59% of those closest to the provision's creation were attorneys. Figures calculated from 37 CONG. Q. ALMANAC 33-34, 52, 81 (1981).
mit a fee award at the market rate.\textsuperscript{71}

Some argue that the special restrictions developed by Congress in tax case fee awards demonstrate an intent to restrict severely such fee awards.\textsuperscript{72} Thus, denial of awards to pro se attorneys is in keeping with this purpose. However, the desire of Congress to limit awards solely to meritorious fee requests does not require judicial creation of further restrictions that discriminate among those valid awards.\textsuperscript{73}

Finally, the "paid or incurred" language is given disproportionate weight, to the exclusion of other aspects on the provision.\textsuperscript{74} The other comparable statutory fee provisions contain seemingly less restrictive language than section 7430.\textsuperscript{75} However, the House Report on section 7430 states that under the provision, "[a] Taxpayer . . . may be awarded reasonable attorney fees."\textsuperscript{76} This is precisely the same language used in the other fee award statutes.\textsuperscript{77} One response is that if Congress meant the same language, they should have used it. However, such a response ignores why Congress enacted a separate fee award provision for tax litigation. Indeed, Congress wanted the fee awards in taxpayer cases to be applied by different means while achieving similar ends. A distinct fee award provision accords due deference to the tax process, reminding the courts that the IRS must not be penalized for doing its job. However, a fee

\textsuperscript{71} Denial of fee awards to pro se attorneys may also be characterized as equating pro se attorneys with pro se non-attorneys, that is to strip attorneys of their legal training.

\textsuperscript{72} Two opposing inferences can be drawn: The statutory limitations placed on section 7430 fee awards might indicate that Congress wanted the courts to take an active role in restricting those awards. Conversely, specificity of limitations also might indicate congressional intent that awards only be restricted as prescribed, without the courts applying further limitations.

\textsuperscript{73} See United States v. Rutherford, 442 U.S. 544, 555 (1979) ("[F]ederal courts do not sit as councils of revision empowered to rewrite legislation.").


\textsuperscript{75} See infra notes 91-186 and accompanying text.


\textsuperscript{77} See supra note 75.
award is available to remedy IRS overreaching. Congress was concerned that fee awards be restricted to meritorious requests only.\textsuperscript{78} Congress seemed mindful of the potential for excessive fee awards, requiring that all legal expenses be reasonable and placing a $25,000 cap on allowable awards.\textsuperscript{79} Legislative history directs that “[t]he determination of what constitutes a reasonable amount for the expenses, costs, and fees actually incurred by a taxpayer in a civil tax action is to be made by the court hearing the action.”\textsuperscript{80} The words “actually incurred” do not indicate that pro se attorney fees are nonrecoverable. The use of the term “actually” merely underscores the responsibility of the court to award legitimate, justifiable and reasonable fees allocable to those claims upon which the taxpayer prevailed, recognizing that many tax attorneys will handle various matters for their clients. Thus “actually incurred” poses the inquiry, “Do the legal services attach to the particular proceedings?” and not, “Were there any legal services provided at all?” Furthermore, it is not entirely clear what meaning should be assigned to the phrase “paid or incurred.”\textsuperscript{81}

Fee awards to pro se attorneys under section 7430 seem entirely consistent with congressional intent. While a denial of such awards is arguably consistent as well, it creates anomalous results, most likely unintended by Congress: The court will award fees to punish

\textsuperscript{78} See supra note 54 and accompanying text.

\textsuperscript{79} I.R.C. §§ 7430(b)(1), 7430(c)(1)(A) (1982). See supra note 44.


\textsuperscript{81} While Webster’s defines the word incur as “to become liable or subject to: bring down upon oneself,” this may bear little resemblance to its legal meaning. WEBSTER’S NEW COLLEGIATE DICTIONARY 611 (9th ed. 1985). See Frisch v. Commissioner, 87 T.C. 838, 846 (1986). Usage of the same statutory language elsewhere is often useful to ascertain meaning. I.R.C. § 162(a) allows “as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year.” I.R.C. § 26 U.S.C. § 162(a) (1986) (emphasis added). An expense has been incurred under § 162(a) if “all the events have occurred which determine the fact of liability and the amount thereof can be determined with reasonable accuracy.” Treas. Reg. § 1.461-1(a)(2) (1967). The requirement that something be either paid or incurred insures that expenses of a contingent or imprecise nature are excluded. Either something has been paid, to complete a transaction, or all events pertinent to a transaction have transpired. The choice of language focuses on the finality of the expense rather than its form. Some expenses may not involve actual payment, but still qualify as expenses for the tax year. See United States v. General Dynamics Corp., 55 U.S.L.W. 4526 (U.S. Apr. 22, 1987), rev’g, 773 F.2d 1224 (Fed. Cir. 1985). This high-profile provision was well-established in 1982 when section 7430 was drafted. It is entirely possible that the choice of “paid or incurred” was deliberate. If a similar reading is assigned the “paid or incurred” language of section 7430, the requirement does not focus on a monetary payment for legal services, but rather on the fact that the legal services have indeed been rendered on the litigant’s behalf in the instant case. For an in depth analysis of the “all events” test since General Dynamics, see Jensen, The Supreme Court and the Timing of Deductions for Accrual-Basis Taxpayers, 22 GA. L. REV. ___ (1988).
objectionable government behavior and deter a potential relapse where the victimized taxpayer happens to hire an attorney, but the identical conduct will be tacitly condoned if the taxpayer happens to be an attorney who appears pro se.

Denial also assumes that Congress meant to depart substantially from the pre-existing scheme of statutory fee awards. While this assumption is plausible under the TEFRA provisions, the Tax Reform Act of 1986 (TRA) seems to indicate otherwise. Several changes were made to "section 7430 to conform it more closely to the EAJA." Furthermore, "[t]he term reasonable litigation costs includes . . . based on prevailing market rates for the kind or quality of services furnished . . . reasonable fees for the services of attorneys." Although no such intention has been expressed, this additional language clearly modifies the "paid or incurred" clause to make it more compatible with a fee award to a pro se attorney than was the naked phrase as previously construed. While the original language plausibly focuses on "paid or incurred" attorney expenses, the revised language focuses unmistakably on attorney services with the express allowance of fee awards for "services furnished."

The McPherson opinion does not directly explore congressional intent behind section 7430, but its result favors an intent to remedy unacceptable government activity. The district court's opinion also advances a remunerative intent since it held that the pro se attorney does incur financial expense. The Tax Court's opinion focuses narrowly on the "paid or incurred" language and cites the "actually incurred" language of the Committee report. The court is overzealous in its insistence that the provision is concerned entirely with monetary expenditures.


A fee award to a pro se attorney is not implausible in light of the legislative history of section 7430. Whatever interpretation of legislative intent is most persuasive, without the courts to effect a congressional mandate, it remains no more than an intent.

B. Judicial Treatment

Judicial opinions provide significant authority in evaluating section 7430 and the validity of pro se attorney fee awards. Since both the Frisch and McPherson cases involve matters of first impression for their respective courts, no binding precedent exists. However, other cases do exist which address pertinent aspects of awarding pro se attorney fees. First, there are cases that apply other statutory fee award provisions. Some award fees to pro se attorneys, while others deny them. Still other cases that do not involve pro se attorneys offer general guidelines. Second, there are cases that apply section 7430 in other contexts. A review of pertinent case law provides numerous guidelines and extensive consideration of the issues. Unfortunately, the McPherson and Frisch opinions do not effectively deal with existing case law. The district court cites only the Frisch opinion and the Tax Court's recitation of case law is cursory and misleading.

Cases that apply other statutory fee award provisions can be distinguished from cases that apply section 7430 on that ground. However, all such statutes, including section 7430, belong to that body of law known as statutory exceptions to the so-called American Rule. They all deal with similar concepts and logic dictates

---

88. While state courts have considered the issue of fee awards to pro se plaintiffs, they do not apply federal statutory provisions, and therefore are of little relative importance. The federal court opinions cited in this Note generally do not refer to state court decisions. But see Ellis v. Cassidy, 625 F.2d 227, 230 n.2 (9th Cir. 1980) (noting split in state courts as to whether attorney's fees should be awarded in pro se situations).

89. 660 F. Supp. at 300.

90. 87 T.C. at 845. See, e.g., infra note 146.

91. Section 7430 alone uses the "paid or incurred" language. Furthermore, each statutory fee award provision only applies to specified types of cases. See supra note 75 and accompanying text. Finally, while section 7430 is applicable in those federal courts where other federal statutory provisions are applicable, it is distinguishable as singularly applicable in the Tax Court.

92. The American Rule that litigants bear their own legal costs distinguishes our legal system from most others, especially in England where the English Rule provides that the losing party pays attorney fees for both oneself and one's adversary. 1 M. DERFNER & A. WOLF, supra note 63, at ¶¶ 1.02[1], 1.03[1]. The courts have developed exceptions, such as where a litigant acts in bad faith, or a result benefits more than just the individual party. Id. at ¶¶ 1.02[2][a], 1.03[2]. Congress has enacted numerous statutory fee provisions, especially to encourage citizen enforcement of public interest legislation through the courts. Id. at ¶¶
that similar concepts should be dealt with consistently.

1. Fee Awards to Pro Se Attorneys: Other Statutes

Decisions that award fees to pro se attorneys contain several recurrent themes: pro se attorneys provide requisite legal services; pro se attorneys' performance of legal services does constitute a substantial expense; payment of fees is not required; significant statutory purposes exist beyond the economic objective of court access; and anticipated problems caused by awards to pro se attorneys are either unfounded or outweighed by other considerations.

a. Duncan v. Poythress

The most comprehensive consideration of statutory fee awards to pro se attorneys is arguably the Eleventh Circuit's majority opinion in Duncan v. Poythress.93 The plaintiff's cause of action involved a civil rights claim under 42 U.S.C. § 1983 alleging that Georgia state officials had violated plaintiffs' right to vote.94 One of three lawyers representing the two originally named plaintiffs was added as a third plaintiff to enable her to testify.95 The district court granted plaintiffs' motion to add the attorney as a named plaintiff, conditioned on her withdrawal as co-counsel.96 Subsequently, she began representing herself as an attorney pro se litigant.97 Plaintiffs prevailed at trial and on appeal on their section 1983 claim.98 The trial court awarded plaintiff attorney fees, under 42 U.S.C. § 1988.99 Defendants only agreed to pay the two non-party attorneys.100 The district court denied the pro se attorney's petition for fees, on the basis of her pro se status.101 The appellate court reversed, addressing the question of "whether attorneys who proceed pro se should be treated like other attorneys (prevailing plaintiff's attorney(s) presumptively entitled to fees) or like lay pro se litigants (not entitled to fees) for the purposes of section 1988."102
First, the court determined that the plain language of the statute does not preclude an award to a pro se attorney.\footnote{Id. at 1511.}

Moreover, this court has determined that section 1988 "should be accorded broad interpretation since the statute is remedial in nature." Thus, the absence of any express prohibition strongly suggests allowance of a fee award, unless the legislative history provides otherwise. The legislative history of section 1988 does not address this issue.\footnote{Id. (quoting Williams v. City of Fairburn, 702 F.2d 973, 976 (11th Cir. 1983)).}

Next, the court "look[ed] to the purposes of section 1988 to determine whether granting attorney's fees to attorney pro se litigants would further those purposes."\footnote{Id.} While the court conceded that economic factors played a role in legislating statutory fee awards, they were not dispositive of the pro se attorney issue.

Although Congress certainly intended section 1988 to help those without the financial resources to hire a lawyer, to the extent that the court below relied on the rationale that section 1988 is only intended to help those who cannot otherwise afford legal assistance, such reliance is misplaced. A plaintiff's lawyer is not denied fees under section 1988 merely because the plaintiff is able to pay for a lawyer, or because plaintiff is not actually required to pay his or her lawyer. Thus, the financial need of the litigant is not the determinative factor in awarding fees under section 1988.\footnote{Id. (citations and footnote omitted).}

Third, the court addressed the assertion that other attorneys could have represented the pro se attorney.

[It is an] anomalous position that [pro se attorney] Kessler could have hired any other lawyer besides Kessler and that lawyer would have been entitled to fees. A related anomaly is the fact that anyone else could have hired Kessler to be his or her lawyer and, if that plaintiff had prevailed as ... here, Kessler would have been entitled to fees.

This second anomaly illuminates the distinction between an

\footnote{Id. at 1511-12 (citations omitted). The Johnson factors are discussed below. See infra notes 187-98 and accompanying text.}
attorney pro se litigant and a lay pro se litigant. A lay pro se litigant could not be hired by someone else to represent him or her in a section 1983 suit; an attorney pro se litigant could be.\textsuperscript{107}

Congressional intent to encourage competent advocacy of the issues is fulfilled in the case of an attorney pro se litigant.\textsuperscript{108} By using one's own legal talents, the pro se attorney "[has] utilized the kind of skilled advocate competent to pursue legal claims, as evidenced by a license to practice law."\textsuperscript{109} Furthermore, a pro se attorney is more like retained counsel than pro se litigants since "a lay pro se litigant cannot sell legal services in the open market."\textsuperscript{110}

The court rejected the policy argument that a pro se attorney "lacks the objectivity necessary to provide a check against groundless or frivolous litigation."\textsuperscript{111} For one,

[c]ounsel representing plaintiffs are often committed to a certain social ideology and thus are not totally independent or objective. In addition, a lawyer-litigant, like any other lawyer, only receives compensation if he or she prevails. A groundless case, of course, would not prevail. Moreover, a lawyer who brings a frivolous suit may be liable for defendant's attorney's fees.\textsuperscript{112}

For these reasons, "the fear that a cottage industry will develop among inactive attorneys who will bring section 1983 cases to support themselves . . . is unfounded."\textsuperscript{113}

In sum, the majority view was that statutory language and legislative intent does not expressly exclude pro se attorney fee awards; such fee awards are more consistent with overall congressional purpose than not; pro se attorneys are more appropriately and fairly categorized as attorneys than as lay litigants for purposes of statutory fee awards; and no adverse consequences of fee awards to pro se attorneys will follow that are not implicit in other fee awards or that are not resolved by the pro se litigant's status as an attorney. Thus, the majority allowed a statutory fee award to a pro se attorney.

Although the fee award in \textit{Duncan} was under 42 U.S.C. § 1988, and the \textit{Frisch} and \textit{McPherson} cases involved 26 U.S.C. § 7430, one can draw meaningful parallels between the two statutory provi-

\textsuperscript{107} \textit{Id.} at 1513.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 1514.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 1515. For a discussion of the "cottage industry" concern, see \textit{infra} notes 226-29 and accompanying text.
The majority opinion in *Duncan* adeptly and eloquently justifies the pro se award and no part of its rationale is theoretically incompatible with section 7430. Yet, the *McPherson* opinion failed even to cite *Duncan*, let alone quote any of its persuasive passages. The *Frisch* court, on the other hand, dismissed the *Duncan* majority opinion as being "of questionable precedential value" because of the differing statutory provisions. However, the *Frisch* court proceeded immediately to the *Duncan* dissent finding it "highly relevant to our inquiry."

Judge Roney's dissent in *Duncan* argued that "[i]his case turns on the meaning of the word 'attorney.'" The dissenting opinion cites "definitions found in over two dozen dictionaries. Without exception they define the word 'attorney' in terms of someone who acts for another . . . ." The dissent devotes the bulk of its analysis to the statute's usage of the term "attorney" and concludes that pro se litigants, whether they are attorneys or not, by definition have no attorney for which fees can be awarded. "To argue that an attorney can be an attorney for herself, but a non-attorney cannot because she is not an attorney, is syllogistic at best, and at worst a path to a result without regard to the meaning of words."

However, this syllogism is far more consistent with the plain language of the statute, namely that attorney fees are to be awarded. Certainly it is as much an affront to the congressional mandate to deny attorney's fees to an attorney, as it is to award them to a non-attorney. The definition of attorney as one who is licensed to practice law can be derived from each dictionary passage cited by the dissent. Furthermore, the dissent seems to ignore the fact that the legal usage of words entails much more than their mere dictionary usage.

Neither court in *Frisch* or *McPherson* utilized the lucid analysis

114. Both provisions target reprehensible behavior by the party assessed fees. Under section 1988, an adverse result at trial on a civil rights claim presumes the requisite behavior, while section 7430 has a more rigorous test. In section 7430 cases where that test is met, presumably the prevailing party has had the harder task than his/her civil rights counterpart, and is at least as deserving of a fee award.

115. 87 T.C. at 843.
116. *Id.* at 844.
118. *Id.* at 1518 (emphasis in original).
119. *Id.*
120. *Id.* at 1519-21. Generally, one licensed to practice law is technically an attorney *at law*. However, attorney, "[i]n its most common usage, . . . unless a contrary meaning is clearly intended, . . . means 'attorney at law', 'lawyer' or 'counselor at law.'" BLACK'S LAW DICTIONARY 117-18 (5th ed. 1983) (emphasis added).
in favor of fee awards to pro se attorneys offered by Duncan. Instead, the Frisch court based its decision, in part, on the narrowly crafted dissent in the Duncan case.\(^{121}\)

b. Other Decisions

Statutory fees have also been awarded to pro se attorneys in Fifth and D.C. Circuit decisions under the Freedom of Information Act (FOIA) fee award provisions. In Cazalas v. United States Department of Justice,\(^ {122}\) the Fifth Circuit held that the appellant's pro se status did not bar recovery of attorney's fees.\(^ {123}\) Since the Fifth Circuit previously had denied a similar fee award to a pro se non-attorney litigant,\(^ {124}\) appellant Cazalas' membership to the Bar figured prominently in the court's responses to each of the government's arguments.

Under the FOIA, "the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred."\(^ {125}\) In response to the contention that a pro se attorney does not incur any legal expenses, the Fifth Circuit found that the appellant amply demonstrated the costs she incurred, both from other work foregone and in terms of personal energy, due to her pro se work. She incurred precisely the sort of expenses that might deter a less determined litigant. Thus, the use of the word "incurred" in the statute is not determinative one way or the other.\(^ {126}\)

The Fifth Circuit also found no basis for the government's argument that while pro se attorneys may possess the requisite skill, they may lack objectivity to avoid unnecessary litigation.\(^ {127}\) The court found that the "[a]ppellant provided precisely the type of determined representation [that] the fee provision is designed to promote . . . in the face of government intransigence . . . ."\(^ {128}\)

The court rejected the government's concern about the creation

\(^{121}\) 87 T.C. at 844.

\(^{122}\) 709 F.2d 1051 (5th Cir. 1983).

\(^{123}\) Id. at 1052-53.

\(^{124}\) Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. Unit A July 1981).


\(^{126}\) Cazalas, 709 F.2d at 1056.

\(^{127}\) Id.

\(^{128}\) Id.
of a "cottage industry."\textsuperscript{129}

There is little reason to suspect that awards of attorney fees to pro se litigants will be a source of abusive fee generation . . . . (I)t would be ludicrous to suggest that appellant sought out a chance for pro se litigation to support her otherwise inactive practice. At the time she filed her FOIA request, appellant had no idea the government would be so slow in forthcoming with information.\textsuperscript{130}

In denying fees to a non-attorney pro se litigant, the court previously had voiced concern about the valuation of legal services provided by lay litigants.\textsuperscript{131} However, "(i)t is relatively simple to value where the pro se litigant is an attorney, for the work foregone is of the same nature as that actually performed."\textsuperscript{132} Furthermore, "Congress sought to encourage legal representation; thus it makes sense to compensate lawyers for this work."\textsuperscript{133}

Finally, the court believed that "[t]he government's] arguments fail to come to terms with the fee provision's raison d'etre."\textsuperscript{134} It serves to provide an incentive for private individuals to pursue their claims, and to deter and punish government misconduct.\textsuperscript{135} "These goals apply with equal force where an attorney litigant proceeds pro se."\textsuperscript{136} The court awarded fees to the pro se attorney as a punishment "only to the extent that the government should be reprimanded for unreasonably failing to comply with its own governing laws."\textsuperscript{137}

In Cuneo v. Rumsfeld,\textsuperscript{138} the D.C. Circuit awarded fees to a pro se attorney who brought a successful FOIA claim against the government.\textsuperscript{139} The court held that "a complainant, who is otherwise eligible . . . for an award of attorney fees, should not be denied those fees simply because he happens to be an attorney."\textsuperscript{140} The court adopted the statutory construction of the D.C. District Court, and held that "reasonably incurred" modifies only the latter part of the

\textsuperscript{129} Id. For a discussion of the "cottage industry" concern, see infra notes 226-29 and accompanying text.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 1057.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1056.
\textsuperscript{138} 553 F.2d 1360 (D.C. Cir. 1977).
\textsuperscript{139} Id. at 1362.
\textsuperscript{140} Id. at 1366.
phrase "reasonable attorney fees and other litigation costs." Thus, attorney fees need not be incurred. Furthermore, an award to pro se attorneys is supported by congressional intent. "[S]uccessful . . . litigants enhance the public interest by bringing the government into compliance with the law. . . . [I]t is equitable that they be awarded for their service." 142

The Cazalas opinion cites Cuneo v. Rumsfeld 143 as awarding FOIA fees to pro se attorneys, 144 but declines to adopt the D.C. Circuit's reasoning since that circuit subsequently awarded fees to pro se lay litigants. 145 Once again, the McPherson decision fails even to mention Cazalas, bypassing persuasive authority. The Tax Court, in Frisch, cites Cazalas and Cuneo, but misconstrues both cases. 146

Besides the Fifth, 147 Eleventh 148 and D.C. 149 Circuits, the Ninth

141. Id. (citing Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976)).
142. Id.
143. Cazalas, 709 F.2d at 1055-56.
144. Id. at 1055.  
145. Id. at 1056.  
146. Frisch v. Commissioner, 87 T.C. 838, 845 (1986). The opinion reads as follows: Focusing on the specific language of 5 U.S.C. § 552(a)(4)(E) (1982), the Court of Appeals for the District of Columbia Circuit has held that foregone income is an "other litigation cost reasonably incurred." [Cuneo, 553 F.2d at 1366.] The Fifth Circuit in Cazalas followed that interpretation of the statutory language, but refused to extend the reasoning to pro se nonattorney litigants, noting the difficulty in computing the worth of their "legal" services. Id.

This entire passage is blatantly erroneous. The Cuneo decision explicitly states that "reasonably incurred" does not modify "reasonable attorney fees" and therefore, attorney fees need not be incurred to be awardable. 553 F.2d at 1366 (citing Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976)). There is no reference to "foregone income" at all. Id. Furthermore, the Cazalas decision explicitly refused to follow Cuneo. Cazalas, 709 F.2d at 1056. Instead, the Cazalas court held, inter alia, that attorney fees had been incurred through foregone income. Id. at 1057. Finally, the Tax Court's chronology is wrong, since fees to pro se non-attorney litigants were denied nearly two years prior to their award to pro se attorneys. Barrett v. Bureau of Customs, 651 F.2d 1087-90 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1981). In truth, the Fifth Circuit refused to extend the reasoning of the pro se non-attorney denial to pro se attorneys, noting that the computational concern that justified denial was not relevant. Cazalas, 709 F.2d at 1057.

147. Cazalas v. United States Dep't of Justice, 709 F.2d 1051 (5th Cir. 1983).
149. Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). While circuits typically have decided the issue of fee awards to pro se attorneys similarly under different statutes, the D.C. Circuit, in Lawrence v. Staats, 586 F. Supp. 1375 (D.C. Cir. 1984), has denied section 1988 fees to a pro se attorney. However, the facts of that case involved various claims beside the title VII claim triggering section 1988. Furthermore, the pro se plaintiff's retained counsel received attorney fees for their services. "There is no evidence that plaintiff did any work on the section 1981 claim prior to hiring counsel." The court's decision seems to be based more on what the plaintiff did, than his pro se status. Id. at 1380.
Circuit\textsuperscript{150} also has awarded fees to a pro se attorney. Yet, several circuits remain uncommitted.\textsuperscript{151} Only the Fourth\textsuperscript{152} and Sixth\textsuperscript{153} Circuits have denied fee awards to pro se attorneys.

2. Fee Awards to Pro Se Litigants: Other Statutes

Few courts have allowed statutory fee awards to lay litigants who have appeared pro se.\textsuperscript{154} Pro se, non-attorney litigants raise special questions and are beyond the intended scope of this Note.\textsuperscript{155} However, those courts that have denied fee awards to pro se attorneys often rely on the decisions involving pro se non-attorney litigants.\textsuperscript{156} Due to that reliance, these decisions are of suspect soundness.\textsuperscript{157} Pro se lay litigants pose three problems not posed by pro se attorneys. First, they are not trained or experienced as lawyers in an adversarial system that, for better or for worse, depends on professional counsel. Second, the concept of attorney fees is a product of the legal profession and the valuation of fees is governed by professional standards. A pro se lay litigant is not entitled to attorney’s fees since his/her legal services are not valued by nor valuable to society. Third, statutory language expressly mentions

\textsuperscript{150} Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). See infra notes 181-85 and accompanying text.

\textsuperscript{151} The Third Circuit has expressly reserved the question. Cunningham v. FBI, 664 F.2d 383, 385 n.1 (3d Cir. 1981). In a case that denied FOIA fees to a non-attorney federal prisoner appearing pro se, the Second Circuit articulated a middle of the road approach to pro se awards. Rather than distinguishing pro se attorneys from non-attorneys or categorically denying all pro se awards, the court applied the test of whether the pro se litigant had “to divert any... time from income producing activity.” Crooker v. United States Dep’t of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980). Pro se attorneys presumably “divert their time” since “it... clear... Congress intended ‘attorney fees’ to be available... to licensed members of the bar.” Id. at 49. (Mr. Crooker also sought FOIA fees unsuccessfully before two other appellate benches. Crooker v. United States Dep’t of Justice, 632 F.2d 916 (1st Cir. 1980) (precedent for denial of fees to all pro se non-attorney litigants); Crooker v. Dep’t of the Treasury, 663 F.2d 140 (D.C. Cir. 1980)). No case has reached the Seventh Circuit to date, but one of its district courts has twice awarded section 1988 fees to pro se attorneys. Shakman v. Democratic Organization of Cook County, 634 F. Supp. 895 (N.D. Ill. 1986) (citing Rybicki v. State Bd. of Elections, 584 F. Supp. 849 (N.D. Ill. 1984)).

\textsuperscript{152} White v. Arlen Realty & Dev. Corp., 614 F.2d 387 (4th Cir. 1980).


\textsuperscript{154} See, e.g., Wolfel v. United States, 711 F.2d 66 (6th Cir. 1983); Cunningham v. FBI, 664 F.2d 383, 385 n.1 (3d Cir. 1981); Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981); Crooker v. United States Dep’t of Justice, 632 F.2d 916 (1st Cir. 1980).

\textsuperscript{155} See supra note 2.

\textsuperscript{156} See, e.g., Falcone v. IRS, 714 F.2d 646 (6th Cir. 1983), infra notes 159-71 and accompanying text.

\textsuperscript{157} Similarly, those courts that award fees to all pro se litigants and rely on the same rationale for awards to both attorneys and non-attorneys may not discern the differences between the two. See Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977).
attorney fees thus effectively barring awards for the services of non-attorneys. These factors cannot be analogized to cases involving pro se attorneys. Reliance by the courts on opinions based on these factors is misplaced.

a. *Falcone v. IRS*

One of the clearest examples of this ill-advised reliance is the Sixth Circuit’s opinion in *Falcone v. IRS.* The case concerned an FOIA claim against the government where a tax attorney had requested certain IRS documents. "The district court found that the plaintiff was a prevailing party, but denied the petition for fees on the basis that the IRS had not acted unreasonably." On appeal, the Sixth Circuit, for reasons unknown, did not review the merits of the district court’s ruling. While a finding of unreasonableness was requisite for a fee award, regardless of the plaintiff’s pro se status, the appellate bench felt compelled to decide the propriety of a fee award to the pro se attorney-plaintiff. The Sixth Circuit had recently denied FOIA fee awards to pro se lay litigants in *Wolfel v. United States.* Applying *Wolfel* to the *Falcone* case, the Court of Appeals stated that "the same reasons which led us . . . to deny attorney’s fees to pro se non-lawyer, FOIA plaintiffs apply with equal validity to pro se attorney plaintiffs." Three reasons were discussed: (1) relief of the burden of legal costs not a relevant concern; (2) encouragement of legal expertise not furthered due to lack of "objective perspective;" and (3) feared creation of "cottage industry."

Had the Sixth Circuit addressed the true issue on appeal, whether the government’s position was reasonable, the case might have been disposed of more neatly and efficiently. The court

---

158. Id.
160. Id. at 646.
161. Id. at 647.
162. Id.
164. *Falcone,* 714 F.2d at 647.
165. 711 F.2d 66 (6th Cir. 1983).
166. *Falcone,* 714 F.2d at 647.
167. Id.
168. Id.
169. Id. at 648.
170. Generally, appellate courts review only those issues raised on appeal by the parties, restricted to the facts of the case. The Sixth Circuit made a general rule against all FOIA fee
should have realized that the very issue it ignored would have resolved its concerns about pro se awards. The fear of unwarranted fee awards does not justify the denial of just ones. Indeed, limiting fee awards to those cases involving unreasonable government behavior will encourage reasonable and prudent attorney behavior. As for the first concern, a pro se attorney's time is potentially a great expense. Additionally, the compensatory aspect of statutory fee provisions is only part of the legislative intent. The Sixth Circuit gives scant attention to the remedial and reward considerations of the provision, and arguably may have erred in unnecessarily deciding the pro se issue. Furthermore, the court's analysis of the issue is highly questionable.

b. *White v. Arlen Realty & Development Corp.*

In *White v. Arlen Realty & Development Corp.*, the Fourth Circuit denied a fee award to a pro se attorney under the Truth in Lending Act. The decision is limited to fee awards under Truth-in-Lending actions, and, therefore, can be distinguished on that ground, and also on the facts. The court appeared to base its denial of the fee award on the pro se attorney's inability to effectively represent himself.

The facts in the instant case provide ample support for our view. White [the pro se attorney], after a protracted legal battle in which his trial inexperience occasioned several admonishments from the district court, lost his case before that court. When he hired outside counsel to press the issues on appeal, counsel mustered effective arguments and won a reversal of the judgment.

It is highly unlikely that any court would have awarded fees to pro se attorneys. Congress had already denied a fee award to this particular plaintiff based on the government's reasonable position. The court unnecessarily created a new rule, when Congress already provided one. *Falcone*, 714 F.2d at 647.

171. *Id.* at 647-48.
173. *Id.* at 389. The Truth in Lending Act provides, inter alia, that "any creditor who fails to comply with any requirement [of the Act] with respect to any person is liable to such person in an amount equal to . . . in the case of any successful action . . . the costs of the action, together with a reasonable attorney's fee as determined by the court." Truth in Lending Act, § 130(a)(3), 15 U.S.C. § 1640(a) (1982). The most obvious difference between this provision and section 7430 is that the latter applies in cases against the government, while the former involves private parties. Furthermore, fees are assessed solely on the basis of an unfavorable ruling under the Truth in Lending Act. Under section 7430, the loss of a case by the IRS does not automatically trigger an award of fees.
174. 614 F.2d at 389.
175. *Id.* at 388.
176. *Id.*
an attorney under such circumstances, regardless of whether the attorney was representing a litigant or appearing pro se. However, the Fourth Circuit unnecessarily denied all pro se attorney fee awards, when it had ample reason to deny only the award in the instant case. The attorney's pro se status was not the cause of his ineptness.

The Tax Court, in Frisch, cited the three reasons discussed in Falcone without elaboration. Frisch cites White, without comment, in a footnote to the court's citation of Falcone.\textsuperscript{177}

The district court in McPherson failed to mention Falcone, let alone distinguish it. In an apparent oversight, the district court in McPherson failed to cite the opinion of its own appellate bench.\textsuperscript{178} While White is only binding precedent for Fourth Circuit district court cases that involve pro se fee awards under the Truth in Lending Act,\textsuperscript{179} the McPherson court missed a golden opportunity to analyze and possibly to neutralize a potentially troublesome authority.

3. \textit{Statutory Awards Where Fees Not Incurred:} Ellis v. Cassidy

Courts have generally agreed that payment or incurred liability to pay for the services of an attorney is not required by statutory fee provisions in cases of pro bono legal representation.\textsuperscript{180} In Ellis v. Cassidy,\textsuperscript{181} the Ninth Circuit awarded fees under section 1988 to defendants even though their legal fees were covered by insurance.\textsuperscript{182} Payment of attorney fees was immaterial to the deterrence rationale behind a fee award due to frivolous or harassing litigation.\textsuperscript{183} Similarly, co-defendant attorneys appearing pro se were also awarded attorney's fees.\textsuperscript{184} Moreover, the pro se attorneys actually had suffered pecuniary loss and performed legal services.\textsuperscript{185} The attorney-client relationship implied in statutory fee awards, at most, requires an attorney and a client who exchange legal services

\begin{itemize}
\item \textsuperscript{177} 87 T.C. at 845 n.10.
\item \textsuperscript{178} The government cited White twice in its submission to the court. Response to Defendant's Application For Award of Costs and Attorney's Fees at 4-5, United States v. McPherson, 660 F. Supp. 298 (M.D.N.C. 1987), appeal docketed, No. 87-2126 (4th Cir. July 13, 1987).
\item \textsuperscript{179} White, 614 F.2d 387, 389 (4th Cir. 1980).
\item \textsuperscript{180} See, e.g., Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (2d Cir. 1978); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974).
\item \textsuperscript{181} 625 F.2d 227 (9th Cir. 1980).
\item \textsuperscript{182} Id. at 230.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. at 231.
\item \textsuperscript{185} Id.
for a remittance. Since a pro se attorney provides legal services, if no remittance is necessary, the only difference between a pro se attorney and an attorney who represents a client is whether the attorney and the client are two distinct personalities or one. "Under current federal attorney fee statutes when the social service rendered by the prevailing party is substantial, the courts have been willing to dispense with formal and rigid attorney and client requirements." 186

4. Calculation of Fee Awards: The Johnson Criteria

A landmark case in the statutory fee award area is *Johnson v. Georgia Highway Express.* 187 While the case does not mention pro se attorney fee awards, it does offer general guidelines which form the cornerstone for any analysis of statutory fee awards. The case involved a fee award to plaintiffs' counsel, pursuant to section 706(k), in a successful employment discrimination class action under Title VII of the Civil Rights Act of 1964. 188 Under section 706(k), "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." 189 The court listed twelve criteria to evaluate the reasonableness of a statutory fee award: (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; 191 (5) the customary fee for similar work; (6) whether the fee is fixed or contingent 192 (7) time limitations imposed by the client or the circumstances; 193 (8) the amount of judgment and the results obtained; (9) the experience, reputation and abilities of the attorneys; (10) the undesirability of the case; (11) the

188. 488 F.2d at 715.
191. "[O]nce the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson*, 488 F.2d at 718.
192. "The statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive." Id. (citing Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), aff'd per curiam, 437 F.2d 959 (5th Cir. 1971)).
193. This criterion allows a premium for exemplary circumstances. Id. at 718.
nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson is a civil rights case with substantially different policy implications than tax litigation and the court there reviews a fee award for counsel hired by the litigants. However, it is reasonable to consider these guidelines in the present context. An award to a pro se attorney is entirely consistent with eight of the twelve guidelines.\textsuperscript{194} Three of the remaining four are arguably favorable as well.\textsuperscript{195} The facts before the Johnson court, and indeed in most litigation, involved counsel retained by the plaintiffs. Thus, it is natural for the court to address only those situations where the attorney and the client are separate and distinct parties. Moreover, the Johnson criteria presume that the fee award is for the services of an attorney. Thus, were the reviewing court to adopt them in a case where a pro se attorney had been awarded fees at trial, the award could justifiably be affirmed.\textsuperscript{196} At any rate, they provide a useful framework for understanding the general purpose and scope of fee awards.

The Johnson guidelines are widely regarded as being the starting point for statutory fee award computations.\textsuperscript{197} Although neither the Frisch nor the McPherson decisions referred to Johnson, any concerns about computational problems posed by fee awards to pro se attorneys appear manageable in light of Johnson.\textsuperscript{198}

5. The United States Supreme Court: Hensley v. Eckerhart

The United States Supreme Court has rendered few opinions in

\textsuperscript{194} The pro se attorney is indistinguishable from hired counsel in terms of numbers one, two, three, five, eight, nine, ten and twelve. Those criteria refer to the attorney's services and the case itself. \textit{Id.} at 717-19.

\textsuperscript{195} Number four mentions both attorney and client, but an attorney pro se litigant employs his legal services in his own behalf, thereby precluding employment elsewhere. Number six states that a statutory fee award does not itself require a fee and thus imposes no impediment where the attorney and the client are the same individual. Number seven again mentions both attorney and client, but in terms of exigent circumstances. \textit{Id.} at 718. The final guideline, number eleven, refers to a concern that an attorney may decrease his fee to a close client, requiring an upward adjustment by the court. Arguably the closest attorney-client relationship is the pro se attorney, when client and attorney are one. \textit{Id.} at 719.

\textsuperscript{196} The Johnson opinion was written by Judge Roney, who wrote the dissent in Duncan nearly twelve years later. He may not have intended to apply his guidelines to the pro se situation that he claimed rendered the attorney a non sequitur. However, his own guidelines do not support his view that an attorney is an agent for another, and not one licensed to practice law. \textit{See supra} notes 117-20 and accompanying text.

\textsuperscript{197} \textit{See} 2 M. DERFNER \& A. WOLF, \textit{supra} note 63, at ch. 16.

\textsuperscript{198} \textit{See infra} notes 230-33 and accompanying text.
the area of statutory fee awards. In *Hensley v. Eckerhart*, the Supreme Court discussed the reasonableness of fee awards in a section 1988 case. Although the issue of awarding fees to pro se attorneys or lay litigants was not addressed, certain points emerge from the majority and concurring opinions that are arguably of some importance. The majority stated that “the most critical factor is the degree of success obtained.” It also was concerned that “[a] request for attorney's fees should not result in a second major litigation.” The Supreme Court does not appear to be preoccupied with the economic objectives of statutory fee awards. There is also little concern about the trial court's considerable role in evaluating the reasonableness of fee requests. There is a general presumption that attorney fees for legal services are awardable to a prevailing party and indeed are often implicit in that party's success. Thus, arguments in favor of pro se attorney fee awards are entirely consistent with the Supreme Court's opinion in *Hensley*.

6. *Section 7430 Fee Awards: Other Contexts*

Judicial application of section 7430 has been fitful and unpredictable since it was enacted in 1982. The unique nature of tax

---

199. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. Tex. L. Rev. 189, 208 (1986). The issue of fee awards to pro se attorneys was denied certiorari on two occasions. Duncan v. Poythress, 572 F. Supp. 776 (N.D. Ga. 1983), rev'd, 750 F.2d 1540, vacated and reh'g en banc granted, 756 F.2d 1481, rev'd, 777 F.2d 1508 (11th Cir. 1985), cert. denied sub nom. Poythress v. Kessler, 106 S. Ct. 1659 (1986) (Burger, C.J., joined by White, J., dissenting). Falcone v. IRS, 535 F. Supp. 1313 (E. D. Mich. 1982), aff'd, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984) (White, J., dissenting). In *Falcone*, Justice White cites the *Cazalas* opinion as holding "that, unlike their nonattorney counterparts, FOIA plaintiffs who are attorneys are not precluded from recovering attorney's fees by virtue of their pro se status. The [Falcone decision] is in direct conflict with that holding." 466 U.S. at 908-09 (citations omitted). In *Poythress*, Chief Justice Burger cited section 1988 cases denying fees to pro se litigants. "Because the award of fees under § 1988 and under the [FOIA] have so much in common, and because the award of fees in this case is in conflict with the general rule against the award of fees to pro se litigants, I would grant certiorari in order to resolve the conflicting decisions in the lower federal courts." 106 S. Ct. at 1660. The Chief Justice overlooked the fact that the section 1988 cases he listed all involved *nonattorney* pro se litigants. *Id.* at 1659.


201. *Id.* at 433-40.

202. *Id.* at 436.

203. *Id.* at 437.

204. See *id.* at 430, 435, 436, 440 (results obtained warrant fee award).

205. See *id.* at 429 (fee must be determined on a case by case basis); *id.* at 433, 437 (district court determines what is "reasonable"); *id.* at 434 (district court may adjust fee).

206. See *id.* at 429.

207. During the first few years after section 7430 was enacted, no favorable rulings came from the Tax Court. This is due in part to its decision in *Baker v. Commissioner* that the
litigation contributes to the problem in two ways. First, there are dozens of separate forums where tax disputes are resolved.\textsuperscript{208} Differences in judicial analysis among the various courts are inevitable and can remain unresolved indefinitely.\textsuperscript{209} Second, since the IRS controls the lifeline of our bureaucratic leviathan, the courts recognize, Congress has legislated, and the citizens acquiesce to the broad discretion of the IRS to administer the nation's tax system.\textsuperscript{210} In the context of section 7430, deference to the IRS has meant reluctance in awarding attorney fees to taxpayers, especially by the Tax Court.\textsuperscript{211} The Tax Court's holding in Frisch is typical. Among the few decisions that do award fees, conflicting opinions, generally between the Tax Court and various circuits, have retarded the development of a coherent case law.\textsuperscript{212} This is not what Congress intended when it provided for fee awards in all tax cases under a single provision.

It is noteworthy that section 7430 was enacted to discourage government's unreasonable pre-litigation position was not relevant and, thus, no fees would be awarded under section 7430. 83 T.C. 822, 826-27 (1984). The First Circuit reached the opposite conclusion in holding that the government's unreasonable pre-litigation position was not relevant and, thus, fees were awardable under section 7430. Kaufman v. Egger, 758 F.2d 1 (1st Cir. 1985), aff'd, 584 F. Supp. 872 (D. Me. 1984). A handful of district courts, along with the Claims Court, have awarded section 7430 fees. See, e.g., Penner v. United States, 584 F. Supp. 1582 (S.D. Fla. 1984); Prudential Bache Securities, Inc. v. Tranakos, 593 F. Supp. 783 (N.D. Ga. 1984); Columbus Fruit & Vegetable Coop. v. United States, 85-2 U.S. Tax Cas. (CCH) ¶ 9518 (Cl. Ct. July 9, 1985). See Langstraat, supra note 2, at 403-14.

208. Decisions of the Tax Court, the Claims Court, and the thirteen circuits each potentially can differ indefinitely without reconciliation by the Supreme Court. Appeals from the Tax Court are taken to the Court of Appeals of the taxpayer's domicile. Additionally, the IRS handles many disputes in administrative proceedings. See Note, Award of Attorney Fees, supra note 2, at 186. The choice of forum usually depends on whether the taxpayer has paid the disputed tax. The Tax Court is the only court that does not require the tax to be paid before the case is litigated. Id. at 156.

209. Id.

210. See supra note 48 and accompanying text.


forum shopping.\textsuperscript{213} Of all the courts that hear tax cases, only the Tax Court remained unauthorized to award fees under the EAJA.\textsuperscript{214} Prior to the TEFRA amendments, if the circumstances warranted an award of attorney's fees, the taxpayer did not want to be before the Tax Court. Congress has corrected that problem, and mandated an award of attorney's fees by all courts in all cases where the IRS has abused its discretion in search of the elusive taxable dollar. After five years, it is ironic that fee awards still differentiate the Tax Court.

If this inconsistent treatment is attributable to anything, it would not seem to be an aversion to fee awards in general. In 1982, Congress also added section 6673 to the Internal Revenue Code "to penalize and deter taxpayers from raising frivolous claims in the Tax Court."\textsuperscript{215} It does for the Tax Court what Rule 11 of the Federal Rules of Civil Procedure does for the rest of the Federal Court system. The Tax Court has shown little hesitation in its application of the provision to award damages to the government and penalize taxpayers for frivolous actions.\textsuperscript{216} Other courts have assessed Rule 11 sanctions in tax cases for similar reasons.\textsuperscript{217} Under both provisions, pro se non-attorney litigants have been penalized\textsuperscript{218} and the circuit courts have affirmed on appeal.\textsuperscript{219} Consequently, judicial fear of pro se attorneys being unjustly enriched by section 7430 awards seems disingenuous. The courts' ability to discern congressional intent when responding to taxpayer misconduct under section 6673 appears inconsistent with their blurred conception of congressional attitude toward government misconduct under section 7430.

Admittedly while judicial treatment of statutory fee awards is inconsistent and incomplete, there is ample precedent to support arguments in favor of section 7430 fee awards to pro se attorneys.

\textsuperscript{213} Note, \textit{Section 7430, supra} note 2, at 771.
\textsuperscript{214} \textit{Id.} at 769. Note, \textit{Award of Attorney Fees, supra} note 2, at 156. \textit{See also supra} note 45 and accompanying text.
\textsuperscript{215} \textit{See Schmalbeck \\& Myers, supra} note 46, at 971; I.R.C. \S 6673 (West 1987).
\textsuperscript{216} \textit{See, e.g.}, Oneal v. Commissioner, 84 T.C. 1235 (1985). \textit{See also Schmalbeck \\& Myers, supra} note 46, at 971.
\textsuperscript{217} \textit{See, e.g.}, Lovell v. United States, 579 F. Supp. 1047 (W.D. Wis. 1984), \textit{aff'd}, 755 F.2d 517 (7th Cir. 1984).
\textsuperscript{218} \textit{See, e.g.}, Doyle v. United States, 817 F.2d 1235 (5th Cir. 1987) (pro se nonattorney litigant charged costs under Rule 11); Kelly v. United States, 789 F.2d 94 (1st Cir. 1986) (pro se nonattorney litigant assessed costs).
\textsuperscript{219} \textit{See, e.g.}, Martinez v. IRS, 744 F.2d 71 (10th Cir. 1984) (per curiam); Davis v. United States, 742 F.2d 171 (5th Cir. 1984) (per curiam), \textit{leave to proceed in forma pauperis denied}, 469 U.S. 1156 (1985); Baskin v. United States, 738 F.2d 975 (8th Cir. 1984).
Similarly, a denial of pro se awards should include an effective response to that precedent. The overall timidity of courts in their application of section 7430, in view of congressional intent to penalize and deter government misconduct, is unjustified, especially where fee awards have been authorized expressly for all cases.

C. Policy Considerations

Finally, any thorough consideration of section 7430 awards to pro se attorneys must address certain policy considerations. Six areas of concern can be clearly identified.

First, successful tax litigation benefits the taxpaying public at large in two ways, regardless of who is litigating the case. Resolution of a particular tax issue will directly affect those taxpayers similarly situated. Furthermore, cases covered by section 7430 fee awards involve, by definition, unreasonable governmental behavior. The exposure of such conduct through effective litigation furthers the public interest in responsible and efficient government. The benefit society reaps as a result of this type of litigation is not diminished when a single individual operates as both attorney and litigant. Thus, such an inquiry is irrelevant when awarding fees under section 7430 for work well done by competent and qualified legal practitioners.

Second, the nature of tax disputes lends itself to pro se attorney representation. Often tax litigation is unexpectedly long and protracted. A taxpayer attorney sporting a modest tax claim may find it imprudent to hire outside counsel and elect to pursue the matter pro se, only to expend more time than anticipated due to an unreasonable government position. These are precisely the facts of

220. Because the resolution of a particular litigant’s dispute may affect countless taxpayers, capable and skilled advocacy is indispensable. A fee award under section 7430 furthers this important purpose because it compensates attorneys, not litigants. The argument that a pro se attorney should be denied fees because a pro se nonattorney is denied them misses the point entirely. The former is not receiving boot for her/his time as a litigant. Rather, the fee award is adjusted specifically to insure compensation for legal services alone. See, e.g., Rybicki v. State Bd. of Elections, 584 F. Supp. 849, 861 (N.D. Ill. 1984). Furthermore, the posture of the tax litigation is not necessarily relevant to the award of fees. A taxpayer may be a plaintiff or a defendant, depending on whether the disputed tax has been remitted. An unreasonable government position and taxpayer due diligence are indicated by overall litigant behavior, and not imputed based on who filed the claim. Cf. Duncan v. Poythress, 777 F.2d 1508, 1512 n.12 (11th Cir. 1985) (“[B]oth pro se attorney plaintiffs and pro se attorney defendants are subject to the same pecuniary loss . . . .”).

221. Schmalbeck & Myers, supra note 46, at 975.

222. Id.
Mr. Frisch's diligent challenge to abusive government practices succeeded but his expenditure of time and expertise went uncompensated due to his pro se status. Yet, had he represented another taxpayer in an identical dispute achieving an identical outcome, fees unquestionably would have been awarded.

Third, while pro se representation may be inadvisable under certain circumstances, it is not prohibited. Nor should it be prohibited. It is a decision that the taxpayer/attorney must make independently. Most likely, poor judgment by the attorney who proceeds pro se will not yield results justifying a fee award under section 7430. It is not for the court to discriminate against particular litigants on the basis of their choice of counsel. If a judge feels that an attorney should hire outside counsel in a tax dispute, the determination should be made at the outset of the trial, not in a post-judgment denial of fees. Furthermore, it is not for the courts to determine whether an attorney should appear pro se; that is for Congress or the Bar to determine.

Pro se representation by an attorney may preserve legal resources, especially since tax disputes usually involve analysis of legal issues of statutory interpretation or application, rather than factual issues which demand greater objectivity of counsel or require the taxpayer to testify. Essentially, the case can be more efficiently disposed of without involving an additional lawyer. Thus,
discrimination against pro se attorneys infringes on an attorney's free choice of using his own experience and talent.

Fourth, there is some concern that allowing pro se attorney fees will encourage a "cottage industry" for underemployed lawyers. 226 This concern has been reviewed by many courts. 227 Whether one is persuaded that lawyers in general will be unjustly enriched by statutory fee awards, that proposition is distinct from fee awards to pro se attorneys under section 7430. It is indefensible to argue that, since all lawyers might wrongly profit, only some of them should be prevented from doing so. First, an attorney's pro se appearance is not inherently abusive, 228 nor does an attorney have to appear pro se to abuse section 7430. Denial of fee awards to pro se attorneys is both an overinclusive and underinclusive answer to the potential abuse of statutory fee provisions. Taken to the logical extreme, all statutory fee provisions should be banned for fear of abuse. Also, section 7430 has built-in safeguards to prevent inappropriate fee awards. 229 The court need not award fees to all pro se attorneys, 226. In Crooker v. United States Dep't of the Treasury, the Second Circuit held that "[FOIA] was not enacted to create a cottage industry for federal prisoners." 634 F.2d 48, 49 (2d Cir. 1980). Attorney fees were denied to a pro se nonattorney litigant, since no time was diverted from income producing activity. Id. The catch phrase "cottage industry" has seen wide use, most often outside its intended context. See infra note 227 and accompanying text. The concern that a layman may attempt to create a racket out of litigious fee generation is quite different from an attorney doing the same. An attorney is an officer of the court, subject to its discipline. The Second Circuit was cognizant of the difference. "We intend no dilution of the rule permitting an award of statutorily authorized attorney's fees . . . where the services of attorneys are used, even though the persons benefited incur no legal fees." Crooker, 634 F.2d at 49, n.1 (emphasis added, citations omitted). It is entirely inappropriate to deny fee awards to pro se attorneys on the basis of a feared cottage industry.


228. Witness McPherson and Frisch. Mr. McPherson was a defendant in the government's action; Mr. Frisch received an unexpected 90-day Notice of Deficiency and was provoked into a litigation posture. See infra note 245. Even if the courts' fears were otherwise legitimate, an award to either McPherson or Frisch would involve no such abuse.

229. The court has discretionary and independent review of each fee award. See Hensley v. Eckerhart, 461 U.S. 424 (1983); id. at 440-41 (Burger, C.J., concurring); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). Section 7430 fee awards must meet a number a strict requirements. Presuming that one can concoct a tax dispute that can withstand the following tests, the hypothetical attorney-cum-cottage industrialist must exhaust all administrative channels, before a complaint can be filed. While court dockets are generally crowded, the Tax Court is especially burdened, hearing more tax cases than any other. Langstraat, supra note 2, at 398; Note, Section 7430, supra note 2, at 771; Note, Award of Attorney Fees, supra note 2, at 183-84. If our statutory fee addict can hold out in the lengthy court proceeding (the average turn around for a tax dispute is five years), and substantially prevail in the face of an unreasonable IRS position, perhaps the court may award pro se attorney fees, unless it follows the Frisch rationale that such an individual cannot be an attorney, and that no ex-
merely those who fulfill the statute's requisite provisions.

Fifth, the determination of an actual monetary award for legal services is more difficult in pro se awards. This is peculiarly true for pro se lay litigants. However, in the case of pro se attorneys, the legal services performed are identical to those performed had the attorney acted as counsel for another litigant. Furthermore, the Supreme Court expects, and the Johnson guidelines require, a careful and thorough review of all monetary awards.

Sixth, statutory fee awards under section 7430 to pro se attorneys will have an impact on future section 7430 awards. If these awards are denied, the result will be that the decisions will set further precedent limiting the application of section 7430. Factual situations of first impression may arise at a later time, requiring the courts to apply section 7430. The failure of the Tax Court to award recognizably justified fees, because of a technically rigid reading of the provision, sends the wrong message to courts faced with a similar task. Frisch and its progeny seriously thwart the proper implementation of congressional directive. None of the provision's policy goals can be served by an emasculated statute.

\[\text{Frisch and its progeny seriously thwart the proper implementation of congressional directive.}^{235}\] None of the provision's policy goals can be served by an emasculated statute.\[\text{See supra note 190 and accompanying text.}^{234}\]

230. See, e.g., Crooker v. United States Dep't of the Treasury, 632 F.2d 916, 921 (1st Cir. 1980).

231. See, e.g., Cazalas v. United States Dep't of Justice, 709 F.2d 1051, 1057 (5th Cir. 1983), cert. denied, 105 S. Ct. 1169 (1985); Cunningham v. FBI, 664 F.2d 383, 386 (3d. Cir. 1981); Ellis v. Cassidy, 625 F.2d 227, 231 (9th Cir. 1980).

232. Hensley, 461 U.S. at 440.

233. See supra note 190 and accompanying text.

234. See, e.g., Minahan v. Commissioner, 88 T.C. 516 (1987), discussed infra notes 255-70 and accompanying text. See Hensley, 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (Judge to be guided by case law interpreting similar attorney's fees provisions).

235. "If Plaintiffs are unable to collect the fees and costs incurred [due to the government's illegal seizure of property without due process of law]... then more naive or less affluent taxpayers would be discouraged from bringing suits which could check further abuses by the IRS." Kaufman v. Egger, 584 F. Supp. 872, 879 (D. Me. 1984). Judicial minds preoccupied with notions of attorneys getting "windfalls," Hensley, 461 U.S. at 444 (Brennan, J., concurring in part and dissenting in part), must not "fail to perform the task Congress has entrusted to it, a task that Congress... has deemed crucial to the vindication of individuals' rights in a society where access to justice so often requires the services of a lawyer." Id. at 442 (reference to 42 U.S.C. § 1988). The recognition of legal excellence, through statutory fee awards, is necessary to insure that those statutes to which the fee provisions are appended remain vital.

236. The lack of a forceful application weakens the statutory provision. "It [is] beyond the competence of judges to 'pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others.' " Hensley, 461 U.S. at 442. (Brennan, J., concurring, in part and dissenting in part) (quoting Alyska Pipeline Co. v. Wilderness Society, 422 U.S. 240, 269 (1975)).
If fees are awarded to pro se attorneys, the provision’s remedial and remunerative purposes are strengthened. Decisions that award attorney fees, whether to pro se attorneys or to litigants who have hired counsel, do not give the signal for a free-for-all fee give-away. Rather, the strict requirements of the provision must be met regardless of the fact situation. Fee award decisions merely indicate that section 7430 is a vital, useful tool to compensate for unjustified government behavior. Courts should be cautious with, but not fearful of, its invocation.

Furthermore, a denial of section 7430 fee awards to pro se attorneys isolates that fee award statute from the growing number of statutory exceptions to the so-called American Rule.\(^{237}\) The legislative history does not support such a distinction.\(^{238}\) A denial also undermines the remedial policy objectives of fee award statutes. A solely economic view of section 7430 cannot be reconciled with the American legal system.\(^{239}\)

To summarize, fee awards to pro se attorneys reward successful efforts to challenge government misconduct; they justly recognize that legal services have been actually and effectively rendered, and do not discriminate against an attorney who happened to appear pro se. Such fee awards prevent the court from making an ex post facto decision about which attorney should represent a litigant and they do not implicitly encourage attorney abuse any more than the statute itself. Nor does their denial deter such abuse. The calculation of pro se attorney fees does not pose a substantial obstacle, and is well within the appointed tasks of the courts. Thus, the denial of valid fee awards to pro se attorneys is inconsistent with and will impact negatively on other fee awards.

The ultimate interpretation assigned to section 7430 determines whether that statute permits a fee award to a pro se attorney. That interpretation is based properly on a review of congressional intent, judicial opinion, and policy considerations. Congressional intent indicates a remedial, deterrent and punitive purpose behind the statutory award of attorney’s fees. Some courts have argued persuasively in favor of awards to pro se attorneys under similar statutes. Those

\(^{237}\) See supra note 92 and accompanying text.

\(^{238}\) See supra note 82 and accompanying text.

\(^{239}\) Ours is the most litigious society in the world, and it hardly can be assumed that Congress merely intended to help those who could not afford an attorney increase that enormous case load, especially in the Tax Court. There has to be some coequal, countervailing purpose to reduce on balance the volume of litigation, while at the same time encourage justified actions. Deterrence and punishment of government excesses provide that purpose. See Schmalbeck & Myers, supra note 46, at 974-82.

---

1988] I.R.C. § 7430 AWARDS TO PRO SE ATTORNEYS 443
courts that have taken the opposite position do not provide as thorough a consideration of the issues. Additional restrictions on section 7430 fee awards endanger that provision's viability. Finally, the policy considerations weigh heavily in favor of fee awards to pro se attorneys. Although no authority dictates conclusively that section 7430 requires fee awards to pro se attorneys, such awards can be convincingly justified based on a reasonable construction of the statute. Unfortunately, neither Frisch nor McPherson offered a clear and thorough statutory analysis.

III. THE CONFLICT RECONSIDERED

With the foregoing presentation of legislative, judicial and policy considerations, the merits and deficiencies of the Frisch and McPherson decisions will now be assessed critically.

The Tax Court decided that the attorney in Frisch v. Commissioner was ineligible for attorney fees under section 7430 solely because he appeared pro se. As was its prerogative, the Tax Court declined to adopt the rationale of those decisions that permit statutory fee awards to pro se attorneys. Instead, fee awards to pro se attorneys were denied on the basis of the "paid or incurred" language of section 7430. "The simple truth is that the plain language of section 7430 cannot be read to include lost opportunity costs, but is limited to actual expenditures." While the "paid or incurred" language arguably may be addressing concerns other than an attorney who represents himself, it is by far the strongest argument against fee awards to attorneys appearing pro se.

The problem with the Frisch opinion is that the Tax Court compromised the clarity of the "paid or incurred" argument by its confusing and cursory presentation of assorted case law. Rather than strictly maintaining the better position that an attorney appearing pro se does not accrue a monetary expense for his own legal services, the Tax Court opted for the argument that an attorney appearing pro se cannot be an attorney. This argument as presented by the Duncan dissent does not rest on a solid foundation and in the context of section 7430 cases, becomes unsupportable.

One consequence of the Frisch holding is that the admittedly unreasonable position of the IRS remains without remedy, save a

241. Id. at 845-46.
242. This is conceded only to be the best argument against fee awards to pro se attorneys, not the best argument in and of itself. See supra text accompanying notes 74-81.
243. See infra text accompanying notes 278-83.
few choice words from the Tax Court. The government was inflexible, burdensome and callous toward the attorney-taxpayer, Frisch. He was offended no less because he appeared pro se. The court admitted that the government’s behavior warranted the assessment of attorney fees, but denied them due to the claimant’s identity.

The weakness of the Frisch opinion is particularly unfortunate since it is now established precedent, binding on future Tax Court decisions. The failure of the Tax Court to espouse a clear and applicable interpretation of section 7430 manifests itself in a subsequent case that relied on Frisch.

On March 5, 1987, the Tax Court issued two opinions regarding section 7430 fee awards in a case that involved a pro se attorney. In Minahan v. Commissioner (Minahan I), petitioners retained the law firm of Minahan & Peterson, S.C., to represent them in disputes with the IRS concerning six alleged federal gift tax deficiencies assessed on the sale of stock to various trust entities. Petitioner Roger C. Minahan was president of the law firm. The government had maintained that the sale of stock shares to six independent trusts, that in aggregate would comprise a controlling interest in

244. The Tax Court stated that the interrogatories submitted by the IRS to Mr. Frisch “were not only burdensome, but, more importantly, in large part unrelated to the issues in dispute.” Frisch, 87 T.C. at 841. The IRS failed “to re-evaluate [its] own position” and “adopted an inflexible attitude.” Id.

245. Mr. Frisch first learned of a tax dispute when he received a 90-day Notice of Deficiency, one day before the end of the three year statute of limitations period. Petitioner’s Motion for Litigation Costs at 3, Frisch v. Commissioner, 87 T.C. 838 (1986) (No. 9417-83). Forced either to pay the disputed amount and pursue the matter in district court, or to commence a Tax Court proceeding, he chose the latter. The IRS allegedly threatened him with penalties and 120% premium interest since the Rockwell donation was a tax motivated transaction. Although economically it was not worth the effort, even had litigation costs been granted in full, Frisch was outraged. “[W]here a governmental agency becomes insensitive and oppressive, it should be challenged—even if in a small case.” Affidavit in Support of Motion for Litigation Costs at 4-5, Frisch v. Commissioner, 87 T.C. 838 (1986) (No.9417-83).

246. The Court implies that “‘the government used the costs and expenses of litigation . . . to extract [unjustified] concessions from the taxpayer.’” Frisch, 87 T.C. at 841 (quoting H.R. REP. No. 404, 97th Cong., 1st Sess. 12 (1981)). This tactic does not become inconsequential merely because separate counsel was not retained. At least the government did not think so. In fact, a belief that a pro se attorney might not receive an attorney’s fee award could produce the exact behavior that such fee awards were targeted to deter.

247. The Tax Court assigns petitioner the burden of establishing unreasonableness. Frisch, 87 T.C at 840. The petitioner does so. Id. at 841. But, petitioner’s identity as litigant precludes his being an attorney, and makes him ineligible to receive an award for attorney fees. Id. at 846.

248. 88 T.C. 492 (1987) [hereinafter Minahan I].
249. Id. at 494-95.
250. Id. at 495.
the company, represented a transfer of that controlling interest and, therefore, appraised the value of the stock at a higher figure to include a premium for the interest. The government conceded the issue one month prior to the scheduled trial. The court held that petitioners had exhausted all administrative remedies, prevailed on the merits, and that the government position was unreasonable.

Litigation costs were awarded under section 7430.

In *Minahan v. Commissioner (Minahan II)*, the court held that petitioner Roger C. Minahan as a member of the law firm representing petitioners was not entitled to attorney's fees, citing *Frisch*. Even though petitioner Roger C. Minahan had rendered payment for his proportionate share of legal expenses, the court extended the paid/incurred rationale of the *Frisch* decision to discount the pro se attorney's payment.

Attorney Minahan has an equity interest in the law firm such that payment to the law firm was in fact payment to himself and not a fee actually incurred. Even if a petitioner-attorney actually renders payment, that does not necessary establish that a fee has been paid or incurred within the meaning of section 7430. We must focus on to whom the payment was rendered.

The court determined that the $25,000 cap on fee awards applied to the aggregate litigation costs of all six petitioners. Even excluding attorney Minahan's pro rata share of attorney's fees, the fee request well exceeded the limit. The net effect of the court's ruling was to reallocate the award among the five petitioners without diminishing the $25,000 payment by the government to Minahan's firm. Thus, the result adheres to the language of *Frisch* but departs from its spirit. Furthermore, the opinion weakens the *Frisch* rationale by extending the paid/incurred argument to an untenable extreme. The *Frisch* opinion had relied upon the plain language of section 7430, citing the dictionary definition of "incurred." The *Minahan II* opinion states without support that "paid or incurred" has special meaning within section 7430, and that pay-

---

251. *Id.* at 498-99.
252. *Id.* at 500.
253. *Id.* at 496-98, 500, 503.
254. *Id.*
255. 88 T.C. 516 (1987) [hereinafter *Minahan II*].
256. *Id.* at 517, 519.
257. *Id.* at 518.
258. *Id.* at 519.
259. *Id.* at 518. Since the action was commenced prior to the 1986 Tax Reform Act, the original TEFRA limit applied. I.R.C. § 7430(b)(1) (1982).
ment is not enough.\textsuperscript{261}

The concurring and dissenting opinions illustrate the weakness in the majority's rationale. The concurrence by Judge Simpson\textsuperscript{262} raises the issue of Minahan's interest in the law firm's profits. The Judge argues that were Minahan the sole stockholder in the law firm, fees that he paid to the firm would not be recoverable. However, those fees paid by co-petitioners to the firm would be recoverable. Furthermore, services were rendered by other attorneys on his behalf. Presumably, his work on the cases that was beneficial to co-petitioners was appropriate as was work by his partner or associate attorneys on his behalf. Although the majority explicitly denied them, the concurrence stresses that these fees are awardable, as long as no attorney fees are awarded to the pro se attorney for his work on his own case. Judge Simpson mentions the law firm's profit distribution as a useful yardstick in making the calculations.\textsuperscript{263}

The concurrence loses sight of the fact that the cases were consolidated. The work on one was work on the others. Indeed, the overall legal costs were greatly reduced. In the court's eyes, attorney Minahan is divorced from his firm as far as his representation is concerned, but he is counsel as far as his co-petitioners are concerned. His appearance on his own behalf is as a litigant, while his simultaneous appearance on behalf of his co-litigants is as counsel. This appears to discredit the Frisch holding that one cannot be both litigant and counsel.\textsuperscript{264}

The dissent\textsuperscript{265} feels that the agency and payment concerns of Frisch have been met in the instant case.\textsuperscript{266} The professional corporation is distinct from attorney Minahan, and it has received payment from him as counsel.\textsuperscript{267}

No policy reason for the result has been articulated by the majority, and I know of none. Neither the language of the statute nor its legislative history provides support for the majority. The fact that attorney Minahan may have shared in the... attorney's fees paid to the professional corporation... is irrelevant. The majority in this case has created a third condition for an award of attorney's fees—that petitioner-attorney must not hold "an equity interest" in the law firm rendering the services. ... This judicial

\textsuperscript{261} Id.
\textsuperscript{262} Id. at 520 (Simpson, J., concurring).
\textsuperscript{263} Id. at 521.
\textsuperscript{264} 87 T.C. at 846.
\textsuperscript{265} Minahan II, 88 T.C. at 521 (Whitaker, J., dissenting).
\textsuperscript{266} Id.
\textsuperscript{267} Id. at 521.
legislation by the majority is without justification.\textsuperscript{268}

In a footnote, Judge Whittaker adds that

section 7430 was liberalized in favor of taxpayers in material respects by the Tax Reform Act of 1986, signed by the President on Oct. 22, 1986, which was prior to release of [the opinion in \textit{Frisch}]. While the doctrine of legislative reenactment would not apply here, either to incorporate or to refrain from incorporating the Court-made law on pro se petitioners, a strong argument can be made for judicial restraint in creating roadblocks to the award of attorney's fees to taxpayers. We should not forge a position that is counter to the current legislative policy without either statutory language or legislative history as support.\textsuperscript{269}

The dissent recognizes the restrictive nature of the \textit{Frisch} decision and urges a retreat from the inevitable limitations of its application. \textit{Frisch} was a unanimous opinion of the seventeen judges on the Tax Court. Barely four months later, in the Tax Court's first application of the \textit{Frisch} rule, only ten judges concurred in the opinion, while seven strongly dissented. This is despite the fact that the fee award was undiminished (the full $25,000 limit was awarded). Thus, both the dissent and the majority views yielded the same result in the particular case. While the entire Tax Court sanctions the fee award, the Court is split over concern about its own construction of section 7430 and the effects of the \textit{Frisch} precedent.

\textit{Minahan II}'s holding that the recipient must now be evaluated has distorted any clarity that \textit{Frisch} may have hoped to achieve. Whether sound or not, \textit{Frisch} stood for the proposition that one cannot hire oneself as one's attorney and receive section 7430 fees. Now, as modified by \textit{Minahan II}, the Tax Court is saying that even the litigant who hires and pays an attorney may not be awarded fees depending on whom was retained. This may be significant in terms of familial, fiduciary, business and a whole host of other relations between clients and lawyers. The Tax Court appears to have abandoned totally any semblance of deference to the legislative purpose behind section 7430, either as remunerative or as remedial. Rather, the Tax Court focuses on who provided the services, and not merely that services were provided. Properly, the inquiry requires, at most, two determinations: an entitlement to a fee award and a measurement of that award. It may be arguable whether a pro se attorney provided any services or whether those services can be measured. However, for the Tax Court to acknowledge both services and fees of the pro se attorney, but nonetheless deny the award on the basis

\textsuperscript{268} \textit{Id.} at 521-22.

\textsuperscript{269} \textit{Id.} at 522 n.1 (Whitaker, J., dissenting).
of who the attorney happens to be, undermines its denial. Fee awards to pro se attorneys may be plausibly denied if one adopts a purely remunerative view of statutory purpose and maintains that no attorney fees are created since no services are provided. However, once one acknowledges that fees and services exist, a denial of fees becomes untenable. The most sound basis for denial is that no services or fees existed in the first place.  

The McPherson result does not ignore the significant punitive and deterrent purposes behind section 7430. The admittedly unreasonable position of the IRS resulted in unfair harassment of attorney McPherson.  

The award of attorney’s fees is small consolation in light of the subsequent appeal and its incumbent defense. Yet the very fact of the appeal proves the award’s worth.

However, the district court has failed to strengthen its decision with any of the numerous arguments in its favor. On appeal, the Fourth Circuit will decide whether to affirm the result. The arguments advocated by both sides will more than likely figure prominently in the appellate opinion. The appellant and appellee briefs mirror both sides of the arguments discussed above. Appellee McPherson stresses the punitive and remedial goals of section 7430 in his argument that a pro se attorney is eligible for attorney fees.
The government uses the *Frisch* rationale to argue that a fee award to a pro se attorney is inconsistent with section 7430.276 The government focuses on the "paid or incurred" language, and urges a remunerative reading of congressional purpose.277

A third argument put forth by the government, however, may prove to backfire. The government maintains that an attorney appearing pro se cannot be an attorney. It cites *Frisch* and the *Duncan* dissent.278 The theory is that section 7430 allows fee awards for the services of an *attorney*,—one who represents another.279 This dictionary definition requires that there be two persons: client and attorney.280 In the case of an attorney who represents oneself, there is no second person.281

However, Congress complicated matters by using the word attorney again in another subsection of 7430. "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."282 If the government's position reflects congressional intent, then this subsection explicitly recognizes that fees for the services of an individual who may not be an attorney (not representing another) shall be awarded. If one does not represent another, one must be appearing pro se. Thus, under the government's definition of attorney, Congress explicitly permitted pro se fee awards, at least before the Tax Court.

While the government's definition might render its appeal, the *Frisch* opinion and this Note moot by expressly providing for pro se attorney fees, it is highly improbable. Rather, Congress must have intended attorney to mean *one licensed to practice law*. This would

---

276. Brief for the Appellant at 16, 19-20, 23, 26, 32, 33, United States v. McPherson, 660 F. Supp. 298 (M.D.N.C. 1987), appeal docketed, No. 87-2126 (4th Cir. July 13, 1987). The government found itself in an awkward position when it petitioned the appellate court to follow a formal briefing schedule, rather than the informal one prescribed by the court rules for pro se litigants. The IRS argued that since McPherson was an attorney, it was more appropriate to follow the schedule normally reserved for counsel. Of course, in its brief it is arguing that a pro se attorney does not have an attorney for purposes of section 7430. *Id.* at 19-23.

277. *Id.* at 15-18, 24.

278. *Id.* at 19-22.

279. *See supra* notes 117-20 and accompanying text.

280. *Id.*

281. *Id.*

support a valid fee award to an attorney appearing pro se.\textsuperscript{283}

The resolution of the conflict between the \textit{Frisch} and \textit{McPherson} decisions might favor the narrow construction given to section 7430 by the Tax Court, or it might be consistent with the broad interpretation urged by the district court in \textit{McPherson}. Either way, the resolution will move statutory fee awards in its direction. The Fourth Circuit's opinion in the \textit{McPherson} appeal is essential to that resolution.

If \textit{McPherson} is reversed, other courts may follow suit to restrict statutory fee awards. If affirmed, the conflict will remain until the Supreme Court grants certiorari on the issue of fee awards to pro se attorneys. Whenever it is resolved, the strength of the issuing court's opinion will depend on the thoroughness and clarity of its rationale.

\textbf{CONCLUSION}

Section 7430 permits an award of attorney fees in tax cases where the government's position is unreasonable. In \textit{Frisch}, the Tax Court denied fees to an attorney appearing pro se. A district court has reached the opposite result in \textit{McPherson}. The resolution of this conflict in favor of the \textit{McPherson} holding will encourage the use of statutory fee awards as a remedial device to curb government malfeasance. A resolution that adopts the \textit{Frisch} position indicates a remunerative use of statutory fee awards. There is no unequivocal message from Congress or the courts to help decide the issue.

However, fee awards to pro se attorneys under section 7430 are entirely compatible with congressional intent, judicial opinion and

\textsuperscript{283} See Brief for the Appellee at 12-14, United States v. McPherson, 660 F. Supp. 298 (M.D.N.C. 1987), appeal docketed, No. 87-2126 (4th Cir. July 13, 1987). \textit{But see} Frisch v. Commissioner, 87 T.C. 838, 846 n.11 (1986). "Our analysis is not changed by § 7430(c)(1)(B) . . . . We interpret [it] to be applicable only to those authorized to represent another, and not those appearing on their own behalf." \textit{Id.} Perhaps, but attorney, in the phrase, "whether or not an attorney," must mean something besides "authorized to represent another." That is, of course, unless one has ad hoc representatives of others, as well as regular representatives. But then the legal profession reemerges: One licensed to represent another. And we are back to the dilemma: Can one represent oneself? To say that a pro se attorney is nothing apart from her/his clients strips the legal profession of its extensive education. Consultation with an attorney may prevent unnecessary litigation. "Frustrations and misunderstandings or failure of understanding . . . may be quickly soothed and resolved by counsel." Barrett v. Bureau of Customs, 651 F.2d 1087, 1089-90 (5th Cir. Unit A July 1981). If legal skill is irrelevant to that consultation, then it must be the "otherness" that calms. However, if one acknowledges a legal expertise, one cannot argue that attorneys are not always attorneys. Otherwise, how could a pro se attorney endure the rigors of two professional lives: attorney one day, litigant the next?
policy concerns. A denial of such awards relies on a narrow consideration of those factors. The courts have sufficient authority to award section 7430 fees to pro se attorneys, if they are so inclined. If not, it may take further congressional action to enforce an effective remedial device against government misconduct.

BRETT BARENHOLTZ