

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 4 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DANIEL JACOBS,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent-Appellee.

No. 21-71211

Tax Ct. No. 7118-19

MEMORANDUM\*

Appeal from a Decision of the  
United States Tax Court

Argued and Submitted August 3, 2022  
Pasadena, California

Before: SILER,\*\* CALLAHAN, and H.A. THOMAS, Circuit Judges.

In 2014, after spending over 20 years as a government attorney and a law school professor, Daniel Jacobs (“Jacobs”) decided to start a new business as an “attorney-scholar-author.” This led him to claim, as business expenses, a number of expenditures for food and lodging, travel, entertainment, and other expenses.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

The IRS first informed Jacobs that his tax return was being audited in October 2016. Over the next two years, Jacobs submitted numerous documents substantiating that he had incurred the claimed expenses. When Jacobs declined to extend the statute of limitations, the Commissioner of Internal Revenue (“CIR”) filed notices of deficiencies in January 2019. Jacobs filed a petition in the Tax Court, the CIR filed an answer, and an in-person conference was held in June 2020. In July 2021, the CIR conceded the case in full.

Jacobs then filed a motion for litigation costs pursuant to 26 U.S.C. § 7430 (a)(2) (permitting recovery of “reasonable litigation costs incurred in connection with such court proceedings.”). The Tax Court denied the motion, finding the CIR’s litigation position to be substantially justified. Jacobs appeals that denial. We have jurisdiction pursuant to 26 U.S.C. § 7482(a)(1), and we vacate the denial of litigation costs and remand.

Section 7430 provides that a prevailing party against the United States in a tax case may be awarded reasonable litigation costs unless the “United States establishes that its position was substantially justified.” 26 U.S.C. § 7430(c)(4)(B). We have held that the burden is “squarely on the United States, not on the taxpayer, to demonstrate that the government’s position was substantially justified.” *Pac. Fisheries, Inc. v. United States*, 484 F.3d 1103, 1107 (9th Cir.

2007). Here, the Tax Court, after briefing and a hearing, found that the CIR's position was substantially justified.

“The Tax Court's determination of whether the Commissioner's position was ‘substantially justified’ is reviewed for abuse of discretion.” *Huffman v. C.I.R.*, 978 F.2d 1139, 1143 (9th Cir. 1992); *see also Kenney v. United States*, 458 F.3d 1025, 1032 (9th Cir. 2006). However, whether the lower court applied the correct legal standard is reviewed de novo. *Roberts v. City & County of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019) (citation omitted).

The Tax Court correctly recognized that we evaluate the reasonableness of the CIR's position separately for administrative and judicial proceedings. *See Kenney*, 458 F.3d at 1032–33; *see also Pac. Fisheries*, 484 F.3d at 1107. In *Kenney* we explained that “[t]he position taken in the administrative proceeding does not automatically apply to the judicial proceeding.” 458 F.3d at 1032 (quoting *Huffman*, 978 F.2d at 1146). Additionally, in *Pacific Fisheries*, we stated that the plain language of the statute, § 7430, “distinguishes administrative from judicial proceedings and does not provide a bridge for conduct or events that span those proceedings.” 484 F.3d at 1108.<sup>1</sup>

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<sup>1</sup> In *Pacific Fisheries*, we also explained that Congress intended “the fee-shifting inquiry under the tax statute to be different from the fee-shifting inquiry under the EAJA,” and noted that “[t]he tax statute includes no gap filler for including prelitigation agency action as part of the government's position in

In *Huffman*, we noted that “[g]enerally, the position of the United States in the judicial proceeding is established initially by the Government’s answer to the petition.” 978 F.2d at 1148 (footnote omitted). Accordingly, Jacobs’ request for litigation costs pursuant to § 7430 depends in large part on the reasonableness of the CIR’s answer in the Tax Court.

Our review of the record suggests that the Tax Court failed to appreciate that evaluating the reasonableness of the CIR’s litigation position, as reflected in the answer, requires some review of the administrative proceedings. The questionable nature of the government’s actions during the administrative proceedings<sup>2</sup> is not directly relevant to litigation costs because § 7430 “does not provide a bridge,” between the administrative proceedings and the judicial proceedings. *Pac. Fisheries*, 484 F.3d at 1108. However, the “reasonableness” of the CIR’s answer here depends on what the CIR learned, or should have learned, from the preceding administrative proceedings. Thus, whether the CIR should have issued an initial

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litigation.” 484 F.3d at 1110. Accordingly, our opinion in *Ibrahim v. DHS*, 912 F.3d 1147 (9th Cir. 2019) (en banc), is not directly relevant to this case.

<sup>2</sup> We are most troubled by Jacobs’ assertions that (1) he fully cooperated with the audits but that the IRS, without actually having reviewed his submitted documents, sent a Notice of Deficiency to the wrong address and subsequently withdrew the notice, and (2) despite his repeated requests for meaningful review of the numerous documents he submitted in response to the IRS’s multiple requests for documentation, the IRS declined to meet with him. At oral argument, CIR’s counsel stated that “bad faith is not a factor the court considers under § 7430” and, when pressed, claimed that the agents made the requisite “reasonable inquiry.”

notice of deficiency or should have held an in-person meeting during the administrative proceedings does not control the inquiry as to the reasonableness of the answer the CIR filed in the Tax Court.<sup>3</sup> However, Jacobs contends that the information provided to the CIR during the administrative proceedings made it unreasonable for the CIR to file an answer denying the allegations in his petition.

Here, it is not clear whether the Tax Court interpreted case law separately analyzing administrative and judicial proceedings as precluding it from considering the merits of Jacobs' assertion that the CIR's answer to his petition was unreasonable. But we read our precedent as allowing the Tax Court, in ruling on a request for litigation costs under § 7430, to consider the administrative proceedings, not to determine the propriety of the proceedings, but as informing the reasonableness of the CIR's answer in the Tax Court. Accordingly, we vacate and remand for the Tax Court to consider the merits of Jacobs' claim that, in light of the information the CIR had received in the administrative proceedings, the CIR's litigation position was unreasonable.

The Tax Court's denial of Jacobs' motion for litigation costs pursuant to

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<sup>3</sup> These concerns might well be relevant to a determination of whether a taxpayer is entitled to administrative costs. *See* 26 U.S.C. § 7430(a)(1). However, Jacobs did not seek administrative costs. As we vacate the denial of Jacobs' motion for litigation costs and remand the matter to the Tax Court, we leave it to the Tax Court to decide whether Jacobs may still seek administrative costs or other costs.

§ 7430 is **VACATED** and the matter is **REMANDED** to the Tax Court for reconsideration consistent with this decision.