

Court to IRS: Pay Legal Fees

A Federal Court Has Ruled Against the IRS and Awarded a Couple \$53,000 in Lawyers' Fees

By LAURA SAUNDERS
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In an unusual move, a federal court has ordered the Internal Revenue Service to pay more than \$53,000 in legal fees to a New Jersey couple in connection with a tax dispute dating to 1998.

"Generally, we don't see attorneys' fees awarded in cases against the IRS," says Vincent Guglielmotti, a tax litigator at law firm Brown Rudnick in New York. "This is a home run for the taxpayer."

The decision in the case, John and Frances Purciello v. U.S., was handed down Dec. 9. The IRS and the Justice Department declined to comment on whether the decision would be appealed.

The Purciellos' lawyer, Stanley Epstein of law firm Greenberg Dauber Epstein & Tucker in Newark, N.J., says that his clients declined to comment on the decision. A U.S. Tax Court case brought by the Purciellos to recover fees they incurred fighting the case while it was still within the IRS hasn't yet been decided, he adds.

Under a provision added to the code in 1982 and clarified by the courts in the 1990s, a taxpayer can recover litigation costs only if he wins a tax case and the IRS can't prove that its position was "substantially justified," which seldom happens.

The Purciellos' suit to recover lawyers' fees, which was filed this year, grew out of an earlier payroll-tax controversy. According to the decision, during 1998 Mr. Purciello, an engineer, worked for three related construction firms that didn't remit payroll taxes for the first six months of that year.



The Internal Revenue Service building in Washington. 'This is a home run for the taxpayer,' says one lawyer.
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The IRS determined that he was among the people who could be held responsible for nonpayment by one of the firms, so it assessed him \$168,000 in penalties. It later withheld tax refunds from the couple to help pay those penalties.

On administrative appeal, the IRS determined that Mr. Purciello wasn't responsible for the nonpayment of payroll taxes and dismissed the unpaid penalties. But the agency didn't issue a refund for nearly \$68,000 it had already secured from the couple on the grounds that they hadn't filed a proper claim.

The couple disagreed and sued to obtain the refund, plus interest.

The Purciellos won their refund suit this year and then sued to recover lawyer's fees. Judge Dennis Cavanaugh ruled in the Purciellos' favor and awarded them \$53,307.50, which included nearly \$8,000 to help cover the costs of the suit for fees. The total for the refund, interest and litigation costs came to nearly \$167,000, according to a court filing.

The IRS doesn't release statistics on legal fees awarded to taxpayers. Robert W. Wood, a tax lawyer practicing in San Francisco, estimates that courts have awarded about \$1.5 million in legal fees and litigation costs in at least 22 cases over the last decade, although some awards may later have been reduced.

Although most awards are for smaller amounts than the Purciello judgment, a few have been larger, Mr. Wood says. In 2009 a Tax Court judge awarded nearly \$338,000 in lawyers' fees and costs in connection with long-running tax-shelter litigation in *Hongsermeier et ux. v. Commissioner*.

Experts cautioned taxpayers hoping to win legal fees from the IRS to expect strong resistance. "If you ask for lawyers' fees, they will fight you tooth and nail," says Jay Starkman, a certified public accountant in Atlanta. In 1994 the Tax Court awarded \$400 in costs to a client of his after what Mr. Starkman calls "a long and bloody fight."

The law also imposes constraints on fee awards. An individual taxpayer can recover litigation costs only if her net worth is \$2 million or below, meaning that the upper limit for a married couple is \$4 million. A business can't have more than 500 employees.

Another limit: The top hourly rate for reimbursement of lawyers' fees, which is indexed for inflation, is \$190 for 2013. Actual fees are often higher. The Purciellos, for example, paid between \$250 and \$495 per hour, according to the decision.

Mr. Wood says that legal fees reimbursed by the IRS could be taxable as well. "In the Purciellos' case, I don't see why they wouldn't be," he says.

Write to Laura Saunders at laura.saunders@wsj.com