

More on Attorney Fees Post-Banks

To the Editor:

I recently wrote about the possibility the Service would pursue the attorney fees issue discussed by the Supreme Court in *Banks*. See Wood, "Will the IRS Pursue Attorneys' Fees Post-Banks?" *Tax Notes*, July 18, 2005, p. 319. Apropos of that topic, I wanted to call *Hawkins v. Commissioner*, T.C. Memo. 2005-149, Doc 2005-13726, 2005 TNT 121-19 (June 23, 2005), to the attention of *Tax Notes* readers. Hawkins sued her former employer for sex and age discrimination, won a jury verdict, and won an appeal. Eventually, she received payment on a judgment, plus legal fees, court costs, and interest for a total of \$1,025,515. Hawkins subtracted the \$417,092 she paid to her attorney, arriving at the net amount of \$608,423. She then claimed half of that net (\$304,212) as a section 104 exclusion.

The IRS informed Hawkins in May 2001 that her emotional distress damages were taxable. Then, in August 2001, the IRS sent a no-change closing letter, specifically telling the taxpayer that it was not necessary to file a Tax Court petition. Two months later, the Service wrote to the Hawkinses saying that it had received new information and that their 1998 return was open to examination.

The Hawkinses argued that their case was closed and could not be reopened. The Tax Court, however, found that a second inspection of the return was not prohibited because the Service gave the Hawkinses written notice. The IRS cannot determine an additional deficiency for the same tax year once it has mailed a notice of deficiency and the taxpayer has filed a Tax Court petition. However, the Hawkinses had not filed a Tax Court petition.

I'm less concerned with the section 104 aspect of the case than with the attorney fee aspect. Obviously, all of this happened long before the *Banks* case was even a glimmer in the eye of the U.S. Supreme Court. However, I do wonder whether cases of this sort might be relied on by the IRS if it does determine (either ad hoc or on some other basis) to pursue attorney fee issues after *Banks*. As I tried to point out in my article in the July 18 *Tax Notes*, I think there are a variety of circumstances in which that may occur.

Very truly yours,

Robert W. Wood
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