REPORT #721

TAX SECTION

New York State Bar Association

Opposition to Proposed Modification

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New York State Bar Association

May 21, 1992

The Honorable Dan Rostenkowski
Chair, House Ways and Means Committee
Rayburn 2111
Washington, D.C. 20515

The Honorable Lloyd Bentsen
Chair, Senate Finance Committee
United States Senate
Hart 703
Washington, D.C. 20510

Dear Sirs:

On behalf of the Tax Section of the New York State Bar Association, I am writing to oppose enactment of a provision similar to section 5704 of H.R. 4210, which would have modified section 7430 of the Internal Revenue Code of 1986, as amended (the "Code") to impose personal liability on employees of the Internal Revenue Service (the "Service") in certain cases.

Under Section 7430, a "prevailing party" may be awarded a judgment or settlement for reasonable litigation or administrative costs incurred in connection with any civil or administrative proceeding brought by or against the United States in connection with the determination, collection or refund of any tax, penalty, or interest. For this purpose, a prevailing party is any party that (i) establishes that the position of the United States in the proceeding was "not substantially justified,"[1] (ii) has substantially prevailed with respect to the amount in controversy, or as to the most significant issue or set of issues presented, and (iii) satisfies certain procedural and eligibility requirements under Title 28, section 2412(d) of the United States Code (i.e., the Equal Access to Justice Act).

Section 5704 of H.R. 4210 would have added a new subsection to section 7430 of the Code, giving a court discretionary authority to make Service employees individually liable for the payment of a portion of litigation costs in any proceeding where a prevailing party was awarded a judgment for litigation costs if the court determined that "such proceeding resulted from any arbitrary, capricious or malicious act of such employee."

H.R. 4210 was passed by the Congress on March 20, 1992; and was vetoed by the President on the same day. The veto was sustained. Nonetheless, we are concerned that a provision similar to section 5704 might be included in future tax legislative efforts. We strongly oppose the enactment of any such rule

[1] Prior to the Tax Reform Act of 1986, an award could be made only where the taxpayer could demonstrate the government's position was "unreasonable." It is not entirely clear how great a change, if any, was intended in substituting the "not substantially justified" standard for the "unreasonable" standard. In this regard, the Tax Court, in Sher v. Commissioner, 89 T.C. 79 (1987), aff'd, 861 F.2d 131 (5th Cir. 1988), concluded that the "not substantially justified" standard did not represent a departure from the prior "unreasonable" standard.

because of the chilling effect it undoubtedly would have on Service employees in the performance of their duties.

Section 5704 of H.R. 4210 is much like a rejected version of an original taxpayer bill of rights that was considered in 1988. Section 3 of S. 579, 100th Cong., 1st Sess. (1987), would have created a new section 7432 of the Code, entitled "Civil Action For Deprivation Of Rights By Internal Revenue Service Employees", which would have permitted a civil action against Service employees and officers for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The Service strenuously opposed the earlier legislation authorizing suits against Service employees, and for good reason. Such legislation would encourage the filing of frivolous suits which already plague the federal courts. The threat of such suits would undermine the independence and morale of Service employees. It also would likely make it more difficult for the Service to attract and hold highly qualified employees at a time at which low government salaries already has adversely affected recruiting efforts.[2]

If enacted, a provision similar to Section 5704 could affect not only Service agents, but any employee of the Service that is involved in the process that eventually leads to a decision in favor of a taxpayer. Thus, it could apply to

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[2] These concerns were clearly articulated in Chief Justice Burger's dissent in Harlow v. Fitzgerald, 457 U.S. 800, 827 (1982).

> "In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service."

employees in the Rulings Division who in complete good faith deny an advance ruling or technical advice request. It also could apply to a Service attorney who refuses to settle Tax Court litigation on a basis which either he or she believes is overly favorable to the taxpayer. The precondition of arbitrary or capricious behavior does not eliminate our concern. What one person believes is reasonable may be viewed as arbitrary or capricious by another.

Moreover, adequate measures exist to remedy arbitrary, capricious or malicious conduct by Service employees. Unfortunately, there have been such instances, but the Service's Office of Chief Inspector, the Office of the Taxpayer Ombudsman, and the Problem Resolution Program all address such shortcomings. Further, the Service as an institution can be held liable for fees, costs and even damages in appropriate cases. Under Section 7433 of the Code, a taxpayer may bring a civil action against the United States for damages sustained in connection with the collection of federal tax due to the reckless or intentional disregard of federal law by a Service employee.[3] Extending such liability to individual employees is unwise.

It is well established that United States employees, acting under color of office, are protected from liability from official acts by either an absolute or qualified immunity. The courts have generally extended absolute immunity to legislators and judges acting in their official functions, prosecutors and similar officials, and executive officers engaged in adjudicative functions. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (legislative immunity); Stump v. Sparkman, 435 U.S. 349 (1978) (judicial immunity); Butz v.

[3] Section 5404 of H.R. 4210 would have increased the limit on such awards from $100,000 to $1,000,000.

Economou, 438 U.S. 478 (1978) (immunity for prosecutors and similar officials). Qualified or "good faith" immunity, by contrast, is extended to federal executive officials exercising discretionary functions. The Supreme Court, in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), held, with regard to such qualified immunity, that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Both absolute immunity and qualified immunity are routinely applied to Service personnel. See, e.g., Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991) (Service attorneys entitled to absolute immunity from damage liability; Service revenue agents entitled to qualified immunity for damage liability). Section 5704 would single out Service employees and deny immunity to them.

Congress has addressed the area in the Federal Tort Claims Act, as amended ("FTCA"). Specifically, Title 28, section 2679(b)(1) of the United States Code, provides that a suit against the United States is the exclusive remedy for a suit for damages for injury or loss of property "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." This provision provides government employees, including Service agents, with immunity against claims of common-law tort. See Christensen v. Ward, 916 F.2d 1462 (10th Cir. 1990); Purk v. United States, 747 F. Supp. 1243 (S.D. Ohio 1989). We are aware of no good reason why Service employees should be excepted from such immunity, particularly since other government employees, to whom it would continue to apply, are presumably no less prone to arbitrary, capricious or malicious acts.

Further, if a provision imposing liability on Service employees were enacted, it is unclear whether Service employees would be required to hire private counsel or whether they would be represented by the Department of Justice.[4] If Service employees were required to retain and pay for private counsel, such a requirement would further discourage the vigorous exercise of their official duties.

Holding Service employees individually responsible for fees, costs and damages is contrary to the underlying principles of immunity as interpreted by the courts and the FTCA, and would impair, rather than further, sound and effective tax administration. Employees of the government must be free to act in their best judgment without fear that personal liability will be imposed on them. They must interpret the tax laws fairly against the backdrop of their responsibility as the guardians of the fisc against attack by sophisticated tax advisors and planners and tax resisters. Congress should not discourage them in their efforts.

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[4] In this connection, Chief Justice Burger's dissent in Harlow v. Fitzgerald, supra, n.7 at 827 stated:

> The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a longstanding policy of representing federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. (Citation omitted.) The Congress frequently pays the expenses of defending its Members even as to acts wholly outside the legislative function.

Very truly yours,

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