COURT AWARDED ATTORNEYS' FEES IN TAX LITIGATION: 42 U.S.C. § 1988

I. INTRODUCTION

A taxpayer's decision to litigate his federal tax liability is usually based on economic considerations. The taxpayer must balance the costs of litigation against the possible tax saving should he prevail. The largest single cost of such litigation will likely be attorneys' fees. In many cases these fees will be so high that a taxpayer will be unwilling "to go to the mat" with the government in order to prove his point—even though the taxpayer may well stand an excellent chance of ultimately prevailing on the merits. The government, on the other hand, need not weigh these costs in deciding whether to settle a particular case because of its virtually limitless resources, at least in comparison to the individual taxpayer's. That section of the Civil Rights Attorney's Fees Awards Act of 1976 referred to as the Allen amendment has the potential to alter that imbalance of resources substantially.

Under the terms of the amendment, the statute allows "the court, in its discretion," to award "a reasonable attorney's fee as part of the costs" to "the prevailing party, other than the United States," "in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code." On its face the

1 Common costs of litigation include attorneys' fees, costs of taking depositions, witness fees and expenses, and court filing fees. Costs, other than attorneys' fees, may be recovered from the United States by a prevailing party. 28 U.S.C. § 2412 (1970). The Tax Court, however, has ruled that costs are not recoverable in Tax Court. Sharon v. Commissioner, 66 T.C. 515, 533 (1976). See also Key Buick Co. v. Commissioner, 68 T.C. 178 (1977).

2 The possible tax saving is not necessarily limited to the current year; successful litigation may also bring tax savings in future years. For example, if a larger basis is established for a depreciable asset, increased depreciation deductions will bring tax savings in future years.

Tax litigation, on the other hand, does involve certain risks for taxpayers. The Commissioner, for instance, could discover new matters and allege an increased deficiency. In such a case the taxpayer may wish he had not brought suit. L. Ken & D. Argue, TAX COURT PRACTICE ¶ 3.03 (5th ed. 1976).

3 See text accompanying note 90 infra.


5 Id. The Attorney's Fees Act states:
In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the
statute appears straightforward; in the context of established tax procedure, however, the statutory language is sufficiently ambiguous as to cause substantial problems of interpretation. Consequently, courts construing the Allen amendment have differed on its proper construction. The key questions in this regard are:

1. Whether attorneys' fees may be awarded in all civil tax cases, including those instances in which the taxpayer is technically the plaintiff (in the Tax Court and in taxpayer refund suits), or whether such an award is limited to those cases in which the United States is the plaintiff, and

2. Assuming a court has the authority to award attorneys' fees in a particular case, under what circumstances should it exercise its power of discretion to make such an award?

The majority of those courts that have considered the issue have construed the Allen amendment narrowly; thus far under the new statute, attorneys' fees have been granted only twice in tax cases. In addition, most courts have indicated that the government must have acted in bad faith or for purposes of harassment before an award of attorneys' fees under the Allen amendment will be considered appropriate. This Comment examines those court decisions with particular attention to the legislative history of the Allen amendment and the relevant policies behind it. The practical effect of a narrow reading of the amendment is examined in light of

**United States Internal Revenue Code,** or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

*Id.* (text of Allen amendment italicized).

For an excellent article on the Allen amendment, written before any courts had dealt with the Act, see Ellentuck, Holub, & Solomon, *Attorneys' Fees Awards in Tax Litigation Now Available to Successful Litigants,* 46 J. Tax. 157 (1977).

6 *See* text accompanying notes 15-20 infra.

7 *See* notes 22 & 23 infra.

8 *See* text accompanying notes 18 & 19 infra.

9 *See* Ellentuck, Holub, & Solomon, *supra* note 5, at 158.

10 *See* note 22 infra.


The reluctance of the courts to award attorneys' fees may be the fulfillment of the prophetic remarks made by Representative Drinan during the consideration of the Allen amendment. In those remarks he expressed his belief that the amendment would allow taxpayer recovery of attorneys' fees only in "unique and really impossible circumstances." 122 Cong. Rec. H12,152 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

12 *See* note 72 infra & accompanying text.
relevant tax procedures. The Comment concludes that the majority of courts have construed the amendment too narrowly, thereby stripping it of any real significance. Further, the Comment suggests that, in the exercise of its equitable discretion under the Allen amendment, a court should adopt a broader view and study relevant factors other than bad faith or harassment; the relative resources and economic strengths of the taxpayer and government are suggested as particularly relevant considerations.

II. Power to Award Attorneys' Fees Under the Allen Amendment

A. Federal Tax Procedure

In order for a court to grant attorneys' fees to a prevailing taxpayer, the Act requires that the United States have initiated a civil action or proceeding to enforce a provision or charge a violation of the Internal Revenue Code. One with little knowledge of the procedural posture in tax cases might think that the government would sue the taxpayer for any deficiency; this, however, is not the case. When the Commissioner of Internal Revenue determines that a tax deficiency exists, a notice of deficiency is sent to the taxpayer; the next move is the taxpayer's. He has three choices of forum:

13 The determination of who is the prevailing party will be made according to federal law. Lieb v. United States, [1977] 2 U.S. Tax Cas. (CCH) ¶ 9752 (E.D. Okla. Sept. 29, 1977). A body of federal case law already exists concerning awards of costs other than attorneys' fees. See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2667, at 128-31 (1973). It may not always be easy to tell who is the prevailing party, however. See Ellentuck, Holub, & Solomon, supra note 5, at 160.

14 See text accompanying note 5 supra.


16 I.R.C. § 6213.

17 Generally, the taxpayer has 90 days in which to decide whether to appeal the deficiency to the Tax Court. I.R.C. § 6213. After the expiration of the statutory period, the Service may assess the amount of the deficiency, I.R.C. § 6213(c), and demand payment, I.R.C. § 6303.

18 There are many factors that enter into the choice of forum. A major consideration is whether the taxpayer has the ability to pay the deficiency; if not, he must sue in the Tax Court. If the taxpayer has the ability to pay, the next most important criterion is precedent. If there is a favorable case on point in one of the available tribunals, that forum is the obvious choice in which to litigate. If specific precedent does not exist, the taxpayer must then look for analogous cases and choose the forum that seems most sympathetic to the facts of his case. It should be noted that the Tax Court now follows the circuit to which the case may be appealed. Golson v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971). See I.R.C. § 7482(a).

Other factors may also influence the choice of forum. For example, the Tax Court and the Court of Claims may be more expert in resolving issues of difficult
the Tax Court, the district courts, or the Court of Claims. If the taxpayer chooses to sue in the Tax Court, no payment is required. If he chooses to bring the action in either a district court or the Court of Claims, the taxpayer must pay the full amount of the alleged deficiency and then sue for a refund.\(^{19}\) The taxpayer is the plaintiff in each forum, and thus, technically, has initiated the court action. In reality, however, the taxpayer would never have done so unless forced to contest the Commissioner's deficiency assessment. In the terms of the Allen amendment, the issue is whether the phrase “action or proceeding” is broad enough to include the deficiency assessment process initiated by the Commissioner.\(^{20}\) If so, the statute will apply to suits in which the taxpayer is the nominal plaintiff. If “proceeding” is given a narrow meaning, as most courts have done, the statute will be severely limited and will apply only to a restricted class of tax actions in which the government is the named plaintiff.\(^{21}\)

**B. Judicial Interpretation**

The majority of those courts that have considered the Allen amendment have construed it narrowly, holding that it is applicable

statutory interpretation or application; on the other hand, if a jury trial is desired, the district court may be more appropriate. Other considerations include differences in available discovery procedures (compare Tax Ct. R. Prac. & Proc. 80-84 with Ct. Cl. R. 71(d)-(f) and Fed. R. Civ. P. 26, 30), docket backlog, availability of witnesses and subpoena powers (compare I.R.C. § 7456 with 28 U.S.C. § 2521 (1970) and Fed. R. Civ. P. 45(e)), and the authority of courts to award costs (see note 1 supra).

The availability of an award of attorneys' fees is one more consideration that must be weighed in the choice-of-forum decision. Attorneys' fees are currently unavailable to prevailing taxpayers in both the Tax Court, Key Buick Co. v. Commissioner, 68 T.C. 178 (1977), and the Court of Claims, Aparacor, Inc. v. United States, [1978] 1 U.S. Tax Cas. (CCH) ¶ 1251 (Ct. Cl. Feb. 22, 1978). Although this Comment suggests that attorneys' fees should be available in all tax forums, pursuant to 42 U.S.C. § 1988, such is not now the case; the attorney must, therefore, consider the recovery of fees in his choice-of-forum calculation.

Largely because of the above factors, forum shopping is commonplace in tax litigation. For a criticism of the resulting inconsistencies in tax law, see U.S. Dept of Justice, *Study of the Trial Court System for Federal Civil Tax Disputes*, 22 Tax Law. 95, 106-19 (1968).

\(^{19}\) See Flora v. United States, 362 U.S. 145 (1960). See also I.R.C. § 7422(e), which requires the taxpayer to choose one of the three courts, thus prohibiting simultaneous litigation in the three forums.

\(^{20}\) The term “action” is almost entirely synonymous with “suit.” *Black's Law Dictionary* 49 (4th ed. 1968). The word “action,” however, is combined with “or proceeding.” In light of established tax procedure, see text accompanying notes 15-19 supra, it would seem that the additional phrase was intended as one of enlargement and should be so construed.

\(^{21}\) See notes 63-66 infra & accompanying text.
only to actions in which the government is the plaintiff. Thus far, only a limited number of decisions have dealt with the provision, and none has been reviewed by a court of appeals; therefore, its scope remains undetermined.

Only one court has allowed taxpayer recovery of attorneys' fees in an action in which the taxpayer, rather than the government, was the named plaintiff. In its cryptic decision in *Levno v. United States*, the District Court of Montana concluded that "[t]he status of a party as a plaintiff or as a defendant is not relevant with respect to the award of attorney fees pursuant to 42 U.S.C. § 1988 in a tax case or proceeding." No reasoning or analysis, however, was offered to illuminate the court's conclusion; the usefulness of the decision is therefore limited.

In the remainder of those suits in which taxpayers were the named plaintiffs, the courts have not allowed recovery of attorneys' fees. Representative of those decisions is *Key Buick Co. v. Commissioner*. Based on the language of the statute, the Tax Court found that the Act applies only to actions "by or on behalf of the United States." Because, in its opinion, a suit by a taxpayer-plaintiff is, "in a strict sense," "by or on behalf of the taxpayer, and not the United States," the court held the statute to be in-

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25 *Id.* 11.

26 See note 22 supra.


28 *Id.* 179.
applicable to all such taxpayer actions. Further, the court asserted that, because taxpayers are always the petitioners in the Tax Court, the Attorney’s Fees Act has no applicability whatsoever in that forum. In support of this conclusion, the court noted that the Act was added to a section of the United States Code that begins: “the jurisdiction in civil and criminal matters conferred on the district courts.” From this, the court concluded that the Allen amendment was applicable only to district courts. Finally, although the Act provides that “the court . . . may allow . . . a reasonable attorney’s fee as part of the costs,” the Key Buick court reasoned that it could not award attorneys’ fees, because the earlier opinion in Sharon v. Commissioner had held that it was not within the competence of the Tax Court to allow costs. The Key Buick court also found that the relevant legislative history supported a narrow reading of the statute. The court relied upon remarks by Senators Kennedy and Tunney, and emphasized particularly their use of the word “defendant” in describing those whom the statute was intended to cover. Remarks made by Senator Allen three months subsequent to the passage of the Act, urging a broad interpretation, were rejected as not properly part of the legislative history.

C. Analysis

1. Legislative History and Statutory Interpretation

The Allen amendment was added to the Attorney’s Fees Act on the same day that the Senate passed it as a compromise to enable passage of the bill in the Senate. Therefore, neither the committee report of the Senate Judiciary Committee (S. Rept. No. 94-1011, 94th Cong., 2d Sess. (1976)) nor the committee report of the House of Representatives Judiciary Committee (H. Rept. No. 94-1558, 94th Cong., 2d Sess. (1976)), have any reference to actions or proceedings under the Internal Revenue Code.

29 Id.
30 Id.
34 68 T.C. 178, 181.
35 Id. 183.
37 “The compromise made by accepting the amendment concerning IRS fees makes the bill more palatable and represents the best the opponents could accomplish.” Id. S17,053 (remarks of Sen. Morgan).
The only legislative history consists of the Senate and House floor debates and, because of the limited debate, the reported comments of Senators and Representatives are to some extent inconsistent or, at best, unclear. A careful reading of the Congressional Record highlights those inconsistencies and illustrates the confusion and misunderstanding that may have been present in the minds of the legislators.

When Senator Allen proposed his amendment, he stated that it was "not unfamiliar to the Senate," because it was "similar to the Goldwater amendment." The Goldwater amendment was an explicit proposal that covered expenses in administrative proceedings before the Service as well as in court, and applied to suits brought by either the taxpayer or the government. One could infer from Senator Allen's remark that he intended his amendment to be a broad piece of legislation, similar in scope to the Goldwater proposal. At another point in that same discussion, however, Senator Allen further described his amendment:

What it does is to add to the civil rights attorneys' fees provision a provision that if the Internal Revenue Service or the U.S. Government brings a civil action against a taxpayer to enforce any provision of the Internal Revenue Code, and the Government does not prevail against the taxpayer, then the court, in its discretion, just as in other cases, would be entitled to award the taxpayer reasonable attorneys' fees. That is all it does, and I hope the amendment will be agreed to.

Because Senator Allen specifically referred to those actions in which the government "brings a civil action," one possible interpretation is that the courts' narrow construction is the one he intended. It is not at all clear, however, that Senator Allen actually had considered the technical question of who stands as plaintiff in tax litigation. An interesting indication of the Senator's possible confusion on the general issue of procedure in tax litigation is his reference in the same sentence to "any provision of the Internal Revenue Code" (emphasis added). Logically, the breadth of the

42 See text accompanying notes 22-35 supra.
word "any" should encompass more than those limited circumstances in which the government is the plaintiff.\textsuperscript{43}

Following Senator Allen's remarks, Senator Helms, the co-sponsor of the amendment, said: "It will provide a measure of equity and fairness to the taxpayers of this country who, in many instances, are being harassed and intimidated by the Internal Revenue Service."\textsuperscript{44} In the week preceding the adoption of the Allen amendment, Senator Goldwater had offered examples of how taxpayers, including himself, had been harassed by the Service.\textsuperscript{45} These examples were not instances where the Service had filed suit against a taxpayer; they were, instead, occasions on which the Service had initiated administrative proceedings. It is quite likely that Senator Helms made his remarks regarding harassment in response to Senator Goldwater's statements, and, if so, this supports a broad interpretation of the statute that would provide some measure of protection for taxpayers against administrative harassment by the Service.

Legislative concern with Internal Revenue Service harassment of taxpayers reappears in remarks by Senator Tunney, the initial sponsor of the Attorney's Fees Act. With respect to the Allen amendment, he stated:

Essentially, it would apply to a situation where a taxpayer is harassed by the IRS. In such a case, a court has discretion to award reasonable attorneys' fees to the defendant. The standard to be applied is the one the courts have adopted with respect to prevailing defendants, as described in the Senate report.\textsuperscript{46}

\textsuperscript{43} The merit of a broader construction of the statute based on its legislative history was recently recognized in Ellis Sarasota Bank & Trust Co., [1978] Fed. Est. & Gift Tax Rep. (CCH) \textsuperscript{13,222}, at 13,194 (M.D. Fla. Oct. 4, 1977).

I won a rather sizable lawsuit involving accusations made against me during my Presidential campaign. After receiving an award that with interest came to $96,000, I had to pay an additional either $8,000 or $11,000. So I was in the hole.

Ever since that happened, my name has been on the computer tape, year after year after year, for no reason at all. I actually think I am a little bit ahead of the Government because they find I am not only right, but have overpaid them. As long as a name stays on that computer tape, it will be audited year after year after year.

These remarks by Senator Tunney contain the only reported use of the word "defendant" in the floor debate prior to the Senate's adoption of the Allen amendment.\textsuperscript{47} Senator Tunney's use of the word, however, is instructive, when "defendant" is accorded its common meaning. Although the taxpayer is technically the plaintiff in most tax suits, his position is actually like that of a defendant.\textsuperscript{48} When "defendant" is interpreted as a description of the taxpayer's posture rather than as a technical term, Senator Tunney's assertion that the appropriate standard in tax cases would be that "adopted with respect to prevailing defendants" is not inconsistent with the broader reading suggested by the other Senators' comments. Those courts that have based their analyses on a literal reading of the word "defendant" \textsuperscript{49} thus appear to have disregarded this common sense view in favor of a too technical reading of the statute.

Three months after the Act became law Senator Allen attempted to dispel the confusion surrounding his amendment, stating:

\begin{quote}
The idea simply is that in any proceeding in which the Government asserts a taxpayer's liability for a tax and the taxpayer asserts that he is not liable for the tax and thereafter prevails, then a court may award fees to the taxpayer as the court sees fit. \textit{The form which the action takes is not of consequence. Since all tax disputes boil down to the Government asserting a liability and a taxpayer denying it, the formal position of the two parties is immaterial. The problem my amendment corrects does not relate to procedural formalities; it relates instead to the substantive imbalance in resources available to the Government and...}
\end{quote}

\textsuperscript{47}Following adoption of the Allen amendment, but prior to the passage of the Act, Senator Kennedy also had spoken of the taxpayer as "defendant." \textit{Id.} (remarks of Sen. Kennedy).

\textsuperscript{48}See text accompanying notes 15-20 supra.

\textsuperscript{49}Robert Malson (former Acting Chief Counsel to the Committee on the Judiciary of the United States Senate) commented on the Allen amendment:

\begin{quote}
The question of the right of a prevailing defendant to recover fees took on greater weight with the acceptance of the Allen amendment to the bill. The question arises because the amendment was offered for the purpose of benefiting a class of litigants who are almost always defendants—prevailing taxpayers in an action involving the Internal Revenue Service. Malson, \textit{In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976}, 21 St. Louis L.J. 430, 437 (1977) (emphasis added) (footnote omitted). Prevailing taxpayers are usually not defendants but almost always plaintiffs. \textit{See} Ellentuck, Holub & Solomon, \textit{supra} note 5, at 158. Thus it seems that Malson has fallen into the same trap as have many Senators.
to a taxpayer when the two dispute an issue of tax liability. 50

Although these remarks were not available to the Senate before the amendment was passed, and, as such, are not part of the legislative history, 51 Senator Allen's explanation is sensible and gives the legislation practical significance. As he indicated, resolution of the issue should not depend on procedural formality but on the reality of the situation. The Key Buick rationale that ignores these functional realities should therefore be rejected.

As a matter of accepted statutory interpretation, a particular provision should be construed in light of the context in which it occurs. 52 In Key Buick, the Tax Court inferred from the provision's location in 42 U.S.C. § 1988 (which confers jurisdiction on the district courts) that the Tax Court (not being a district court) cannot award attorneys' fees. 53 The Allen amendment, however, was a hurried compromise 54 and did not properly belong in that section; its placement there was the result of political compromise, not logic. 55 It would seem unwise therefore to derive its meaning from


Moreover, I inserted the word "proceeding" in my new amendment specifically to include administrative proceedings or audits so that fees and costs in connection with audits or other I.R.S. agency proceedings could be awarded by a court on application of a prevailing taxpayer. I also included the term "proceeding" so that it would be clear that in any case involving a disputed tax, the court would be free to award attorney fees so long as the taxpayer prevailed and the court felt that a fee award was appropriate considering all factors in the case and notwithstanding the formalistic characterization of the taxpayer as plaintiff or defendant or as appellant and appellee.

Incredibly, Mr. President, some commentators have suggested that my amendment would only apply in cases in which the Internal Revenue Service brought an action to recover an alleged overpayment of a tax refund. I find that suggestion ludicrous. Certainly that could not have been in the mind of any Senator here when we adopted my proposal. No, Mr. President, that interpretation of my amendment would make our action meaningless and would require a highly formalistic—indeed, almost 18th century—reading of the words used. Mr. President, the idea was simple, and I believe it was reasonably clearly expressed.

Id. (emphasis added).


55 For example, the Goldwater amendment, that Senator Allen claimed to be similar to his own, 120 CONG. REC. S17,049 (daily ed. Sept. 29, 1976) (remarks of Sen. Allen), was a proposed amendment to that section of title 26 that controls the jurisdiction of the Tax Court. 122 CONG. REC. S16,446 (daily ed. Sept. 22, 1976).
the context of the surrounding statutory sections. Furthermore, the legislative history does not distinguish among courts that may exercise discretion to allow attorneys' fees. The language of the Act itself refers simply to "the court"; therefore, any tribunal that may be termed "a court" should have authority to award fees under the Act.56

Finally, in Key Buick the Tax Court relied on its earlier decision in Sharon v. Commissioner57 to find that the Tax Court had no power to award attorneys' fees.58 Literally, section 1988 allows award of attorneys' fees only as a part of "costs," which was construed to refer to those costs allowed under 28 U.S.C. § 2412.59 In Sharon, the Tax Court held that it had no authority to award those costs,60 a decision which is supportable on two grounds. First, the costs provision appears in title 28 and applies only to courts as defined in that title.61 The Tax Court, however, is organized under provisions of title 26 (Internal Revenue Code). Hence, the costs provisions in title 28 could have no authorizing effect on a court


58 68 T.C. at 179.
59 Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.
60 66 T.C. at 533-34.

As used in this title: The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

A distinction between the constitutional status of the Tax Court and the district courts and Court of Claims provides an argument for denying the Tax Court jurisdiction to award attorneys' fees and other costs. The status of the Tax Court as an article I or legislative court (C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL
created under title 26. Second, as an historical matter, when section 2412 was enacted, the Tax Court was a separate administrative agency and technically not a court. Therefore, section 2412 could not have been intended to confer the authority to award costs on that administrative agency. **Key Buick's** extension of Sharon to deny the Tax Court's authority to award attorneys' fees is incorrect. First, it is unlikely that those who sponsored the Allen amendment realized the technical and restrictive meaning of the word "costs" and the trap it presented for the taxpayer-litigator. Second, the Allen amendment was designed specifically to relieve a problem concerning tax litigation. Congress could not have meant to deny the Tax Court—the forum that handles the largest amount of tax litigation 62—the authority to award attorneys' fees. Courts should not do so now by a hypertechnical reading of the statute.

2. Policy Considerations

The most compelling argument in favor of a broad construction of the statute is a consideration of its actual scope were courts to continue to construe it as narrowly as they have so far. Although the taxpayer is usually the plaintiff in civil tax litigation,63 the government may be the plaintiff—in actions to enforce summonses 64 and collect taxes,65 for instance. Generally, the substantive tax

Courts § 11 (3d ed. 1976)) with judges who serve a fifteen year term theoretically makes the Tax Court a less impartial tribunal than the article III courts in which judges serve for good behavior. U.S. Const. art. III, § 1. Therefore, the discretion of the court should be limited. In practice, however, there is little difference between the judicial nature of the Tax Court and the district courts. See Kenner v. Commissioner, 387 F.2d 659, 690 (7th Cir.), cert. denied, 393 U.S. 841 (1968); Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir.), cert. denied, 385 U.S. 918 (1966); Martin v. Commissioner, 358 F.2d 63 (7th Cir.), cert. denied, 385 U.S. 920 (1966). Although the judges serve fifteen year terms, I.R.C. § 7443(e), the provisions for removal are limited, I.R.C. § 7443(f), and almost all judges are appointed automatically for additional terms if the judge so desires. See Gribbon, *Should the Judicial Character of the Tax Court be Recognized?*, 24 Geo. Wash. L. Rev. 619, 629 n.31 (1956).


63 See text accompanying notes 14-20 supra.

64 See I.R.C. § 7604.

65 The Commissioner may avail himself of one of three methods of collection: (1) he may bring suit against the taxpayer in a state or federal court to recover the amount of the tax and execute on the judgment; (2) under [I.R.C.] section 6331(a) he may proceed by the summary method of distraint and levy against the taxpayer's non-exempt property and sell it to satisfy the amount of the assessment; or (3) he may proceed by court action under [I.R.C.] section 7403 to enforce its lien provided by [I.R.C.] section 6321 upon the taxpayer's real and personal property.

liability of the taxpayer, however, is not raised as an issue in such cases; the correctness of the Commissioner's deficiency assessment is usually litigated in other instances. In limiting application of the Allen amendment to those actions in which the government is the named plaintiff, the courts have reduced the statute to relative meaninglessness. With a single exception, the courts have refused to acknowledge that this is the inevitable result of a narrow reading of the amendment. In *Aparacor, Inc. v. United States*, Judge Nichols, although concurring with the court in its narrow reading of the statute, stated:

I would have . . . squarely faced up to this fact: the Allen amendment, as construed by the court, accomplishes an insignificant result, unworthy of the attention devoted to it by the Congress in Debate. This is because, when the Government asserts and the taxpayer denies a liability for a tax, the Internal Revenue laws are so framed that it is the taxpayer who must sue. The Government need not do so. If the taxpayer should wait for the Government to sue him, he would allow the assessment to become final, and his right to contest his liability would be gone forever.

The courts must, as Judge Nichols suggested, "squarely face" the fact that, in adopting a narrow construction of the Allen amendment, they have effectively nullified an action of Congress. Although the *Aparacor* court was willing to accept that outcome, it is not a result that other courts should readily embrace. Undeniably, the more reasonable approach is that which accords meaning and content to congressional statutes. Courts should avoid an approach, such as some have used, that hinges on the technical definitions of "plaintiff" and "defendant," while ignoring the practical realities of tax litigation. After all, neither the word "plaintiff" nor the word "defendant" ever appears in the Act. The only requirement in this regard is that the government have initiated the action or proceeding.

Further, if the decision in *Key Buick* continues as authority in the Tax Court but is not uniformly adopted elsewhere, taxpayers for whom the Tax Court is the only available forum will be those

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66 See text accompanying notes 14-20 *supra*.

The Second Circuit, however, has allowed a taxpayer "to challenge the underlying merits of the assessment" in an action brought by the United States to enforce a lien. *United States v. Lease*, 346 F.2d 696, 698 (2d Cir. 1965).


68 *Id.* 83, 486.
most injured. The prime motivation in creating the Tax Court was to provide a forum for taxpayers to litigate the determination of their tax liability prior to payment.\(^69\) Because the taxpayer must pay and sue for a refund in the other available forums, the Tax Court is the only forum for a taxpayer with illiquid or limited resources.\(^70\) Denying this taxpayer the ability to recover his attorneys' fees is a detriment impacting specifically upon the class of taxpayers the Allen amendment was designed to help.\(^71\)

In light of the actual posture of the parties in tax litigation, the added burden on the taxpayer with limited resources, and the severely limited scope of the provision if construed narrowly, the logical conclusion is that courts should interpret the statute sufficiently broadly to permit a prevailing taxpayer to recover attorneys' fees when he is the nominal plaintiff, but his actual position approximates that of the defendant in the usual lawsuit.

### III. Guidelines for the Award of Attorneys' Fees

The standard by which a court is to exercise its discretion in awarding attorneys' fees is not stated in the statute. For the most part, the courts have adopted a standard which requires a showing of bad faith or harassment on the part of the Government.\(^72\) In *United States v. Garrison Construction Co.*,\(^73\) however, the court specifically held that the government action need not rise to the level of bad faith. There, the court awarded attorneys' fees to a taxpayer against whom the Service had commenced an enforcement of summons proceeding. The Service had previously been “advised that the taxpayer had submitted to one complete inspection of its books . . . and that additional inspection would not be allowed unless the Secretary . . . informed [the] taxpayer in writing pursuant to Internal Revenue Code section 7605(b) that an additional inspection was necessary.”\(^74\) Thus, the suit should not have been

\(^69\) See H.R. REP. No. 179, 68th Cong., 1st Sess. 7 (1924); Flora v. United States, 357 U.S. 63 (1958); Oshausen v. Commissioner, 273 F.2d 23, 26 (9th Cir. 1959), cert. denied, 363 U.S. 820 (1960).

\(^70\) See text accompanying notes 14-20 supra.

\(^71\) See text accompanying note 90 supra.


\(^74\) Id. 88,389.
brought, because the procedure for additional inspections had not been followed. In conclusion, the court held that bad faith did not have to be shown, "but that the Court may award fees where a taxpayer has been subjected to vexatious or harassing treatment not amounting to bad faith." 75

Another case indicates that even a showing of governmental harassment may be unnecessary for taxpayer recovery under the Allen amendment. In *Levno v. United States,* 76 the District Court of Montana awarded attorneys' fees to a taxpayer even though no issue of harassment had been raised. The facts were very similar to the circumstances underlying cases previously decided in favor of the taxpayer. 77 The plaintiff, a cash-basis farmer, attempted to smooth out his annual income by selling his cattle in one year and collecting the proceeds in the following year. The taxpayer arranged to sell his cattle to the S&H Sheep Company which in turn would sell the cattle to the livestock market. The sale to S&H was pursuant to a written contract providing for payment in the following year, although S&H had already been paid by the livestock market. The Service claimed that the farmer realized taxable income in the year he sold the cattle. The court held for the taxpayer, and cited analogous cases and Revenue Rulings; no rationale, however, was offered for its award of attorneys' fees. 78 In light of the strong legal precedent 79 favoring the taxpayer, the court may have been indicating that the suit should not have been brought. 80 As Senator Allen stated in his remarks subsequent to the Act's passage:

My amendment is meant to cover, for example, cases in which a relatively small tax liability is at issue, legal precedent on the subject clearly favors the taxpayer, yet the

75 Id.
77 See, e.g., Amend v. Commissioner, 13 T.C. 178 (1949) (contract for sale of wheat, delivery in one taxable year, payment in second).
79 It is not clear when precedent may be said to favor the taxpayer. For example, must the Supreme Court have ruled on the issue, or does a court of appeals decision constitute sufficient precedent? In reaching its decision, the *Levno* court cited Revenue Rulings (Rev. Rul. 162, 1958-1 C.B. 234; Rev. Rul. 358, 1969-1 C.B. 139), a court of appeals opinion from its own circuit (Patterson v. Commissioner, 510 F.2d 45 (9th Cir. 1975)), and a district court case from another circuit (Oliver v. United States, 193 F. Supp. 930 (E.D. Ark. 1961)). The court, however, failed to indicate which of these authorities, if any, were crucial to its decision.
80 The court might also have been suggesting that the failure of the Service to follow its own previous rulings was evidence of bad faith. For cases holding that an agency is bound by its own administrative rulings, see Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1954).
Government persists in litigating an issue which has been previously resolved or which is fairly obviously going to result in a decision in favor of the taxpayer.81

Thus, although the government's action probably did not amount to harassment,82 it might be characterized as frivolous. Whatever the standard is labeled, however, Levno contemplates the award of attorneys' fees on grounds broader than a bad faith or harassment standard.

Although both Garrison and Levno are reasonable interpretations of the Allen amendment, a close reading of the legislative history supports a broader view. Senator Tunney commented that "the standard to be applied is the one the courts have adopted with respect to prevailing defendants, as described in the Senate report." 83 The Senate report allows the recovery of fees if it is "shown that [the] suit was clearly frivolous, vexatious, or brought for harassment purposes" . . . . This bill thus deters frivolous suits . . . ." 84 The Senate report, however, was written before the original bill was expanded by the Allen amendment, and did not contemplate suits by the government.85 Furthermore, it is questionable whether the awarding of attorneys' fees against the United States would actually deter suits by the Service. Frivolous suits by private plaintiffs in non-tax actions might well be deterred; the initiator of such an action must weigh whatever benefit he expects to derive from the harassment against the cost of both his own and his opponent's attorneys' fees. There would be no comparable deterrent effect upon the Service, however, because any amounts assessed against it would not come out of any individual's pocket.

Senator Kennedy implicitly recognized a distinction between tax suits and other types of litigation:

It should be clear, then, that a provision authorizing fee awards in tax cases has a fundamentally different purpose

82 "The terms 'bad faith' and 'harassment' connote intentional, purposeful conduct motivated by a malicious or discriminatory purpose." Maney v. Ratcliff, 399 F. Supp. 760, 772 (E.D. Wis. 1975) (construing Younger abstention doctrine); see Duncan v. Perez, 445 F.2d 557, 560 (5th Cir.), cert. denied, 404 U.S. 940 (1971).
83 122 Cong. Rec. S17,050 (daily ed. Sept. 29, 1976) (remarks of Sen. Tunney). Senator Tunney also said: "The purpose of this amendment is not to discourage meritorious lawsuits by the IRS, but to discourage frivolous or harassing lawsuits." Id.
85 Id.
from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous [sic] or otherwise unwarranted lawsuits . . . .

Thus, the purpose of the Allen amendment seems to be more one of protecting the taxpayer by making him "whole" than one attempting to deter suits brought by the government.

Further support for a broad reading of the statute can be derived from the Senate report that accompanied the Act. Although not technically applicable to the Allen amendment, that report is important because it indicates the legislative context in which the amendment was passed. The Senate report adopts the standard articulated in United States Steel Corp. v. United States, which allows a court's judgment to be guided by both the conduct of the parties and by economic considerations. The economic considerations include the ability of a party to pay, and the amount at issue in the suit. Senator Allen echoed the importance of these considerations in his remarks subsequent to the passage of the Act:

[M]y amendment will permit a court in its discretion to award attorney fees and costs to a taxpayer who elected to "go to the mat" with the Government rather than to cave-in when faced with the prospect of protracted litigation and substantial attorney fees over an issue involving a relatively small sum. But, Mr. President, the court need not determine that the Government has harassed the taxpayer nor need the court determine that the Government has in some way acted in bad faith. The amendment was [sic] adopted mentions neither harassment nor bad faith,

88 519 F.2d 359, 363 (3d Cir. 1975).
89 The court in United States Steel observed that, unlike a private litigant, the government's resources are very great and are sustained by the taxing power. Thus, attorneys' fees may be levied against the government more readily than against a private party. Although ability to pay may enter into a court's decision whether to award counsel fees, it would not, standing by itself, appear to be a sufficient ground on which to base such an award. United States Steel Corp. v. United States, 519 F.2d 359, 364 n.24 (3d Cir. 1975); see text accompanying note 98 infra.
but for some reason commentators have implied that such conduct would be a necessary precondition to an award of fees to a prevailing taxpayer. No, Mr. President, a court in exercising its discretion should focus rather on the relative resources of the parties and on the perseverance of the taxpayer in vindicating his position. 90

Senator Allen's remarks are reminiscent of the private attorney general rationale for the award of attorneys' fees. The Civil Rights Attorney's Fees Awards Act was passed in direct response to the Supreme Court's rejection of that concept as an equitable doctrine. 91 The private attorney general concept recognizes that, in certain circumstances, actions by private plaintiffs serve the general public interest; in effect, the private plaintiff is encouraged to undertake an enforcement role in lieu of the government. 92 Pursuant to the decision of the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 93 federal application of the private attorney general rationale is limited to those instances in which Congress has given specific statutory authorization for the award of attorneys' fees. 94

The collection of taxes is a basic governmental function. Although it may seem absurd to suggest that the government has any reasonable interest in encouraging lawsuits which might have the effect of inhibiting its ability to collect those taxes, there is a sub-

91 See Malson, supra note 49, at 432-36.
94 See Berger, supra note 92, at 282.
stantial public interest in preventing an arbitrary or unfair application of the nation's tax laws. That interest is implicitly recognized in the legislative history of the Allen amendment and in those court decisions that have allowed taxpayer recovery of attorneys' fees where the government has acted frivolously, in bad faith, or for purposes of harassment. The public interest, however, extends further. The taxpayer should be made whole and should not be penalized because of an incorrect deficiency assessment by the Service. The taxpayer with a relatively small tax bill may well decide not to pursue the issue rather than win his point in court at the cost of attorneys' fees that may exceed his tax liability.

In an action contemplated by the Allen amendment, a court is limited only by its equitable discretion in determining whether to award attorneys' fees. Clearly, such an award should be made when the government has acted in bad faith, frivolously, or for purposes of harassment. However, a close reading of the legislative history as well as the presence of sound policy considerations indicate that taxpayer recovery of attorneys' fees should not be so confined. Although the legislative history may not support the award of attorneys' fees to all prevailing taxpayers, it similarly does not support the limitation of such awards to instances of governmental bad faith or harassment. In reaching its decision whether to award attorneys' fees to a prevailing taxpayer, a court should, as Senator Allen suggested, take into account the relative resources and economic strength of the taxpayer. If able to exercise fairly broad discretion to award attorneys' fees, a court can weigh all relevant facts and circumstances, and equitable considerations should govern.

IV. CONCLUSION

The Allen amendment has been described as possibly "one of the most significant developments for the future of tax law (and tax lawyers)." Although the issue is not yet settled, present interpretation of the statute leaves that prophecy unfulfilled. The confusion in the courts is due to the ambiguous wording of the Act and a legislative history that is both unclear and inconsistent. Although Congress could solve most of the problems through further amendment, it is unrealistic to believe that such action will be forth-
The Allen amendment passed only because it was a compromise—a means by which the number of votes required to pass the Civil Rights Attorney Fees Act of 1976 could be assembled—and it is therefore doubtful that Congress will review and clarify the Act. Moreover, because the Allen amendment has been severely limited by the courts, those legislators opposed to its passage have prevailed, as a practical matter, and therefore they will not act.

Although a narrow construction is certain not to expand the meaning intended by Congress, it is also likely that such a reading nullifies the intent of Congress; such a construction renders the statute almost completely ineffective and does nothing to effectuate its underlying policies.

Whether the amendment is to have any real significance will depend largely on the diligence of taxpayers in requesting fees from trial courts and in appealing adverse decisions; there remains an opportunity to reverse the current trend and obtain rulings favorable to the taxpayer-litigator. Any attorney who represents a taxpayer in a federal tax action should claim a reasonable attorney's fee if the circumstances of the case indicate that the government's action or behavior is in some way improper. If the government has acted frivolously, for the purpose of harassment, or if the issue is well settled in the taxpayer's favor by established precedent, chances are best for taxpayer recovery; the economic strength of the taxpayer should also be a relevant consideration. The attorney must avoid any temptation to buttress his claim with questionable charges of bad faith against the government: as the court said in *Chrome Plate, Inc. v. District Director of Internal Revenue*, '[c]harges of this nature will, in the future, either be supported by facts or else left unsaid.'

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100 For example, Senator Goldwater had been attempting to have enacted legislation similar to the Allen amendment for 12 years preceding its passage. See 122 CONG. REC. S16,482 (daily ed. Sept. 23, 1976) (remarks of Sen. Goldwater).


102 Id. ¶ 9104.