

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOSEPH A. INSINGA,)
)
 Petitioner,) **CZ**
)
 v.) Docket No. 4609-12W.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

Petitioner in this case claims a “whistleblower award” under 26 U.S.C. § 7623(b). Now before the Court is respondent’s motion to dismiss for lack of jurisdiction, filed on March 30, 2012. We “have jurisdiction to determine jurisdiction”, *Romann v. Commissioner*, 111 T.C. 273, 280 (1998); and to do so we will schedule an evidentiary hearing on respondent’s motion.

Respondent’s motion asks “that this case be dismissed for lack of jurisdiction on the ground that no notice of determination under IRC § 7623(b)(4) sufficient to form the basis for a petition to this court was sent to petitioner nor has respondent made any other determination with respect to petitioner's whistleblower claims that would confer jurisdiction on this Court.” (Emphasis added.) Petitioner has apparently not received a letter from the IRS either granting or denying him an award, and the IRS contends that in the absence of such a letter, we are therefore necessarily without jurisdiction and must dismiss the case. Petitioner opposes on the grounds that “his claims have, as a practical matter, been denied, and that he has therefore received a *de facto* rejection.”

The *amicus curiae* (National Whistleblower Center) argues in the alternative that where an award determination has been unreasonably delayed, the Tax Court has jurisdiction--in light of § 7623(b)(4) and under § 706(1) of the Administrative Procedures Act (“APA”), 5 U.S.C. § 551 *et seq.*--to “compel agency action unlawfully withheld or unreasonably delayed”. Respondent counters that the APA

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itself confers no jurisdiction and that the mandamus statute (28 U.S.C. § 1361) by its terms gives jurisdiction only to “[t]he district courts”. Respondent is correct; but the “All Writs Act” (28 U.S.C. § 1651) applies to “all courts established by Act of Congress” (*cf.* 26 U.S.C. § 7441, establishing the U.S. Tax Court); and the U.S. Court of Appeals for the D.C. Circuit has held in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (“*TRAC*”), that, in view of the APA and the All Writs Act, “it is clear--and no party disputes this point--that” if a statute (there, 28 U.S.C. § 23421(1)) confers on a court exclusive jurisdiction to review a final agency order, then even before the final order has been issued, the court has “jurisdiction over claims of unreasonable [agency] delay”. (The D.C. Circuit would appear to be the default venue for any appeal in this case; see 26 U.S.C. § 7482(b)(1).)

We have not decided whether the reasoning in *TRAC* applies to the Tax Court and its jurisdiction under § 7623(b)(4). Nor have we decided whether, if the APA does not directly apply, this case nonetheless presents one of those instances in which the Tax Court, “in appropriate circumstances, borrow[s] principles of judicial review embodied in the APA.” *Ewing v. Commissioner*, 122 T.C. 32, 54 (2004) (Thornton, J., concurring).

We believe we ought not to reach those questions if we do not need to do so. Instead, we ought first to determine whether petitioner may have in fact received a determination, as he contends he has. As we explained in *Cooper v. Commissioner*, 135 T.C. 70, 75 (2010), “the labeling [is] not dispositive”. Rather, what confers jurisdiction on this Court under section 7623(b) is a “determination regarding an award”. The statute does not explicitly require a “notice” of a determination, nor a written determination, nor even any communication of a determination. Rather, we have jurisdiction if there has been “[a]ny determination regarding an award”. If the IRS has in fact finished its consideration of an award claim and has not made an award, then evidently it has “determined” to conclude the matter administratively without granting an award. In order for us to decide whether (as petitioner contends) the IRS has made such a *de facto* determination, we may need to learn: whether the IRS has completed its consideration of petitioner’s claim; what, if anything, the IRS is still doing with regard to petitioner’s claim; and whether the IRS expects to do anything in the future with regard to petitioner’s claim. If there has been a cessation of administrative action, then a reviewable determination may have been effectively made thereby. Such questions can be explored at the hearing we will conduct. To that end, it is

ORDERED that, no later than March 22, 2013, counsel for the parties shall consult with each other and with the Chambers Administrator for the undersigned judge (at 202-521-0850) to schedule a telephone conference to be held as early as possible and in any event no later than April 5, 2013, at which to discuss:

- the date on which an evidentiary hearing could be held in this case in Washington, D.C., during the last two weeks of June 2013;
- the schedule for pre-hearing activities, including the exchange of all hearing exhibits, the filing of pre-hearing memoranda (which, inter alia, should identify all witnesses to be called and should describe their anticipated testimony), and the submission of stipulations of fact pursuant to Rule 91; and
- any special orders or directions that either party recommends the Court should make with respect to maintaining taxpayer confidentiality during the hearing.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
March 13, 2013