No. 18-1003

ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

DAVID T. MYERS,
Appellant/Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Appellee/Respondent.

ON APPEAL FROM THE UNITED STATES TAX COURT
No. 2181-15W
Hon. Tamara W. Ashford, Tax Court Judge, Presiding

OPENING BRIEF & RULE 28(f) ADDENDUM FOR THE APPELLANT DAVID T. MYERS

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the Appellant certifies as follows:

A. Parties, Intervenors, and Amici Curiae

The Parties appearing in the Tax Court were as follows:

- David T. Myers
- Commissioner of Internal Revenue

There were no intervenors below or amici curiae before the Tax Court, however, the the Harvard Tax Clinic (represented by Prof. Carlton M. Smith) will file an amicus brief in this case.

B. Ruling Under Review

The rulings under review are as follows:

On June 7, 2017, the Tax Court (Ashford, *J.*) entered an order of dismissal for lack of jurisdiction. JA-206.[1] Said order was accompanied by a precedential opinion, to wit: *Myers v. Comm'r,* 148 T.C. No. 20 (June 5, 2017). JA-187.

[1] Numbers shall refer to pages of Joint Appendix which appear as follows: JA-001, JA-002, etc. The Docket entries at the Tax Court level will be referred to as "DE___".

C. Related Cases

This case was not previously before this Court (but was before the Tenth Circuit before it issued an order transferring the instant case to this Court), and (to the best of the undersigned's knowledge) there are no related or pending cases in this Court or any other appellate court or the Tax Court presenting similar issues to those presented here.

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TABLE OF AUTHORITIES

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GLOSSARY

A.P.A.	Administrative Procedures Act
C.D.P.	Collection Due Process
Internal Revenue Code	Title 26 of the United States Code
I.R.M.	Internal Revenue Manual
Treasury Regulations	Title 26 of the Code of Federal Regulations
U.S.P.S.	United States Postal Service

STATEMENT OF SUBJECT MATTER & APPELLATE JURISIDICTION

The Tax Court had jurisdiction under 26 U.S.C. § 7623(b)(4). This Court has jurisdiction pursuant to 26 U.S.C. § 7482(a)(1).[2] Myers timely noticed his appeal (JA-210) under 26 U.S.C. § 7483 and Fed. R. App. P. 13.

STATUTES & REGULATIONS

26 U.S.C. § 7623(b)(4) states:

> **(4) Appeal of award determination.** Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

26 C.F.R. § 301.7623-3(c)(7) states:

> **(7) Rejections.** A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. If the Whistleblower Office rejects a claim for award under section 7623(b), pursuant to § 301.7623–1(b) or (c), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary rejection letter that states the basis for the rejection of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary rejection letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary rejection letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's

[2] Venue is proper in this Court under 26 U.S.C. § 7482(b)(1) (flush language).

> legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the rejection of the claim, including the basis for the rejection, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

26 C.F.R. § 301.7623-3(c)(8) states:

> **(8) Denials.** A denial is a determination that relates to or implicates taxpayer information. If, with respect to a claim for award under section 7623(b), the IRS either did not proceed based on the information provided by the whistleblower, as defined in § 301.7623–2(b), or did not collect proceeds, as defined in § 301.7623–2(d), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary denial letter that states the basis for the denial of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary denial letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary denial letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the denial of any award, including the basis for the denial, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

26 U.S.C. § 6330(d)(1) provides:

> **(d) Proceeding after hearing.**
> **(1) Petition for review by Tax Court.** The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Tax Court have jurisdiction over the case below?

In answering the aforementioned question, the following sub-issues need to be addressed:

A. Were the letters issued by the IRS so bereft of information as to not be qualify as a "determination" under 26 U.S.C. § 7623(b)(4)?

B. If any of the IRS letters were a "determination" under 26 U.S.C. § 7623(b)(4), did the failure to send such determination(s) via certified mail render the determination(s) a nullity?

C. Is the filing deadline in 26 U.S.C. § 7623(b)(4) jurisdictional?

2. Is the filing deadline 26 U.S.C. § 7623(b)(4) subject to equitable tolling, and should be tolled on the facts of this case?

3. If the IRS letters did not qualify as a "determination" under 26 U.S.C. § 7623(b)(4), did the Tax Court have the power to order the IRS to issue the Appellant a notice of determination?

STATEMENT OF THE CASE

I. FACTS & PROCEDURAL HISTORY.

In January 2015 Myers filed his whistleblower petition with the Tax Court. JA-006.

The Commissioner moved to dismiss Myer's whistleblower petition for lack of jurisdiction on the grounds that the petition was not filed within the time set forth in 26 U.S.C. § 7623(b)(4). JA-011. The Commissioner alleged that the IRS Whistleblower Office received Myer's whistleblower claim in August 2009, and that the IRS Whistleblower Office denied the claim via letter in March 2013. JA-013. The Commissioner asserted that Myers failed to petition the Tax Court within the thirty-day time period set forth in Section 7623(b)(4).[3] JA-014.

Attached to the Commissioner's motion were various exhibits, which, as relevant here, included the November 20, 2013, letter from the Whistleblower Office to Myers (JA-043 (Exhibit B)). The November 20th letter stated in full that:

> We considered the additional information you provided and determined your claim still does not meet our criteria for an award. Our determination remains the same despite the information contained in your latest letter.

[3] All section references are to the Internal Revenue Code (Title 26 of the United States Code) unless otherwise stated.

> Please keep in mind the confidentiality of the informants' claims process and understand that we cannot disclose the facts surrounding an examination, i.e. taxes collected and audit examination.
>
> Although the information you submitted did not qualify for an award, thank you for your interest in the administration of the internal revenue law.
>
> If you have any further questions in regards to this letter, please feel free to contact the Initial Evaluation Claims at 801-620-2169.

JA-043.

The Commissioner also attached an undated letter to Myers (JA-044 (Exhibit C)), which stated in full that:

> We have considered your application for an award dated 08/17/2009. Under Internal Revenue Code Section 7623, an award may be paid only if the information provided results in the collection of additional tax, penalties, interest or other proceeds. In this case, the information you provided did not result in the collection of any proceeds. Therefore, you are not eligible for an award.
>
> Although the information you submitted did not qualify for an award, thank you for your interest in the administration of the internal revenue law.
>
> If you have any further questions in regards to this letter, please feel free to contact the Informant Claims Examination Team at 801-620-2169.

JA-044. The Commissioner also attached a March 6, 2014, letter (JA-045 (Exhibit D)), which essentially parrots the language found in the November 20, 2013 letter (*see* JA-043 (Exhibit B))

The Tax Court ordered the parties to submit additional briefing. JA-002 (DE14).

In response to the request for additional briefing Myers asserted, albeit inartfully given his *pro se* status, that the thirty-day time-period in Section 7623(b)(4) is subject to equitable tolling. JA-047 ("the affirmative defense of equitable estoppel to estopp any statute of limitation…"); ("[t]he Petitioner preys (*sic*) that Court grants (*sic*) him the doctrine of equitable estoppel to estop the [R]espondent from utilizing an unjustified statute of limitations defense."). However, in a subsequent filing, Myers assert that the "time limits are subject to equitable tolling." JA-065. Myers cited to *United States v. Kwai Fun Wong,* 135 S. Ct. 1625 (2015) for the proposition that Section 7623(b)(4) is subject to equitable tolling. JA-065.

Myers also argued that he "never received a final determination letter from the [R]espondent via certified mail and therefore feels that the 30 day appeal period has not yet started." JA-084. Myers analogized Section 7623(b)(4) to other Internal Revenue Code sections,[4] which "all have similar rules establishing the time for bringing an action and the 90-day time period for these sections doesn't begin to toll

[4] *See* JA-084 (referencing Sections 7428, 7476, 7478, 7479, 7477, and 7436). Specifically *see* 26 U.S.C. § 7428(b)(3); 26 U.S.C. § 7476(b)(5); 26 U.S.C. § 7478(b)(3); 26 U.S.C. § 7477(b)(3); 26 U.S.C. § 7479(b)(3); 26 U.S.C. § 7436(b)(2) (all calling for certified or registered mail).

(*sic*) until the Secretary sends a notice of determination via registered or certified mail." JA-084. Thus, "[c]laims under Section 7623(b) [...] also requires the [R]espondent to send a taxpayer a final determination *via certified mail* and since the [R]espondent did not comply with this mandatory procedure in this case, the 30 day time limit to appeal still hasn't started either." JA-084 (emphasis in original).

Myers raised below that none of the correspondence from the Whistleblowers Officer "inform[ed] the Petitioner where he could appeal the [R]espondents (*sic*) determination as revised IRM part 25.2.2.10 requires [R]espondent to do." JA-123.

On October 6, 2015, the Tax Court heard argument in respect to the Commissioner's motion to dismiss. JA-133. At that hearing the Tax Court observed that "[b]ut on the other hand, these letters really provide no clear signal or instructions to a taxpayer, let alone Mr. Myers, as to his next steps for judicial review, so that's sort of the struggle." JA-138 (Tr. 5:13-16).

Upon questioning by Judge Alford, the IRS employee testified that in 2013 and 2014 none of the denial letters from the Whistleblower Office contained language in the letters about petitioning the Tax Court. JA-154 (Tr. 22:16-19). The IRS employee candidly acknowledged that the standard denial letters failed to inform taxpayers that they could file a petition with the Tax Court. JA-155-56 (Tr. 23:24-24:2). The IRS employee also testified in response to questioning from Judge Alford that

notwithstanding that the extant Internal Revenue Manuel ("I.R.M.") provision called for determination letters to be send via certified mail, the Whistleblower Office was not doing so because "we don't have the money to send them certified." JA-163 (Tr. 31:1-2). Thus, in the five years that the IRS employee had been assigned to the Whistleblower Office, she had *never* sent a final determination letter via certified mail. JA-163 (Tr. 31:9-15).

Judge Alford concluded the hearing by observing that "it just seems like, you know, the Internal Revenue Service issuing these letters, they can easily frustrate judicial review, you know, by issuing ambiguous denials." JA-179 (Tr. 47:21-24).

II. RULING PRESENTED FOR REVIEW.

On June 5, 2017, the court below issued its precedential opinion below, *viz. Myers v. Comm'r,* 148 T.C. No. 20 (2017) (JA-187) holding that Myers filed his petition outside of the thirty-day time period in Section 7623(b)(4) and consequently dismissed Myer's case for want of jurisdiction. JA-206.

Myers appealed (JA-210); the instant case followed.

SUMMARY OF ARGUMENT

The Tax Court's order and opinion below resulted from various errors, each requiring that the order of dismissal be vacated and the case remanded for further proceedings.

First, Myer's petition was not untimely (and consequently the Tax Court should not have dismissed for want of jurisdiction based on a belated filing) because the purported notices of determination lacked the basic information that would have (a) informed Myers of his right under Section 7623(b)(4) to petition the Tax Court and (b) put Myers on notice that he had thirty days to filing his petition with the Tax Court. Indeed, in this case the purported letters of determination made no reference whatsoever to Section 7623(b)(4)'s time limit. Moreover, the IRS Whistleblower Office failed to send Myers a preliminary denial or rejection letter as required under the applicable Treasury Regulation.

Second, the IRS Whistleblower Office failed to send Myers his purported notice(s) of determination via certified mail, which is a prerequisite to starting Section 7623(b)(4)'s thirty-day time limit. Assuming, *arguendo,* that Section 7623(b)(4) is jurisdictional, then a certified mailing is required to start the running of the thirty-day statutory period. The failure of the IRS to transmit the Whistleblower Office's purported notice(s) of determine compels the legal conclusion that Myers was not provided his "ticket to Tax Court" and, as a result, the Tax Court should have dismissed for want of jurisdiction based on the lack of a statutory compliant notice of determination.

Third, under recent Supreme Court case law, Section 7623(b)(4)'s thirty-day deadline was not jurisdictional, and the Tax Court erred in so holding. Instead, the thirty-day time limit is a claims processing rule that must be plead and proven by the IRS as an affirmative defense.

Fourth, because Section 7623(b)(4)'s thirty-day deadline was not jurisdictional, equitable tolling is available to litigants like Myers. The Tax Court erred in failing to consider and hold that equitable tolling was available to Myers to excuse his belated filing against the federal government. In this case, given (a) the short time period established in Section 7623(b)(4) (i.e., thirty days), (b) Section 7623(b)(4) is not phrased in clear language establishing the thirty days as jurisdictional, (c) the statutory language is not highly technical, (d) the Tax Court is a pre-payment forum with a majority of *pro se* litigants, and (e) the relative small number of whistleblower cases adjudicated by the Tax Court, all of which (individually and collectively) leads to the inescapable conclusion that Section 7623(b)(4) was subject to equitable tolling in general. In respect to Myer's case in particular, equitable tolling should have been available to him given that the statutorily required notice(s) of determination were so bereft of information as to not have put Myers on notice of his ability to petition the Tax Court and the exceedingly short time period to do so.

Further, under Supreme Court and binding circuit precedent, equitable tolling was available in respect to Section 7623(b) because this Internal Revenue Code section was enacted in 2006, well after recent Supreme Court case law establishing that time deadlines contained in federal statutes are presumed to be nonjurisdictional in nature.

Fifth, the Tax Court had the power under the Administrative Procedures Act and the All Writs Act to order the IRS Whistleblower Office to issue Myers his "ticket to Tax Court" in the form of a notice of determination. In this case, given that Myer's whistleblower claim had been pending for years, and given that he had not been provided his statutorily significant document that forms the predicate basis for Tax Court jurisdiction, the Tax Court should have order IRS Whistleblower Office to issue Myers his "ticket to Tax Court."

STANDARD OF REVIEW

This Court reviews jurisdictional and statutory interpretation questions *de novo*. *Munsell v. Dept. of Agric.*, 509 F.3d 572, 578 (D.C. Cir. 2007); *United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002). However, *pro se* pleadings are held to a "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity and the significance of the issues involved, Appellant respectfully request oral argument, which he believes would assist this Court in the determination of the issues of first impression presented on appeal.

ARGUMENT

I. THE TAX COURT ERRONEOUSLY CONCLUDED THAT MYER'S PETITION WAS UNTIMELY.

A. A whistleblower determination must contain an explanation as to why an award is disallowed and reference the time period to petition the Tax Court. In this case, the IRS letters were so bereft of information as to not qualify as a "determination" under Section 7623(b)(4).

An individual may petition the Tax Court to appeal an award determination by the Commissioner within thirty days of receiving a determination from the Commissioner of that award. 26 U.S.C. § 7623(b)(4). The statute does not clearly define "determination." *Kasper v. Comm'r*, 137 T.C. 37, 41 (2011). A denial of an award constitutes a determination under the statute. *Cooper v. Comm'r*, 135 T.C. 70, 75 (2010). A determination is "a final administrative decision regarding petitioner's whistleblower claims in accordance with the established procedures." *Id.* at 76. Furthermore, a determination must be a "final conclusion that petitioner is not entitled to an award and provide[] an explanation for this conclusion." *Id.* A determination may only be issued after the Commissioner has "conclude[d] all aspects

of its investigation." *Whistleblower 22231-12W v. Comm'r*, T.C. Memo 2014-157 (2014). A determination in a whistleblower claim must contain "a statement on the merits of" the claim as well. *Comparini v. Comm'r*, 143 T.C. 274, 279 (2014).

Whistleblower determinations are similar to determinations of requests for abatement of interest under 26 U.S.C. § 6404(h)(1). The Tax Court only has jurisdiction over an abatement of interest when the Secretary of the Treasury issues a "final determination" on a taxpayer's request for abatement of interest. In both instances, there is no particular form which is required for a determination, but in order to be a "determination", the document must represent the final administrative step for the IRS. A key difference, though, between determinations on interest abatements (and determinations regarding innocent spouse claims under 26 U.S.C. § 6015(e)) is that interest and innocent spouse determinations must be "final" before allowing for Tax Court jurisdiction whereas "any" determination of a whistleblower claim grants such jurisdiction.

This distinction has lead the Tax Court to conclude that the Commissioner may issue multiple determinations in a single whistleblower claim. *Comparini*, 143 T.C. at 283. The *Comparini* court, though, issued a concurring opinion noting that the holding of the Tax Court would lead to a situation where a whistleblower does not have one clear "ticket to Tax Court". *Id.* at 287 (Halpern and Lauber, *JJ.*,

concurring). The controlling opinion noted that the decision did not relate to a "hypothetical" situation where a series of identical letters could give rise to a series of tickets to Tax Court. *See id.* at 284 ("hypothetical issues not before us"). In this case, there is a series of identical letters.

In the case at bar, the Tax Court adopted part of the holding from *Comparini*, namely, that the Commissioner could issue a series of determinations each of which could independently create jurisdiction for the Tax Court. However, the Tax Court in the case below ignored the other holding of *Comparini*, which is that a determination must contain a statement on the merits of the whistleblower's claim. In this case, Myers received conflicting information regarding his whistleblower claim. In the Commissioner's first determination the Commissioner states that Myer's information did not lead to the collection of any tax. *See* JA-044 ("the information you provided did not result in the collection of any proceeds.") However, in the subsequent determinations the Commissioner admits that 26 U.S.C. § 6103 prevents the Commissioner from disclosing whether or not the Commissioner collected any tax from the subject of Myer's whistleblowing efforts. *See* JA-045 ("[p]lease keep in mind that the confidentiality of the informants' claims process and understand that we cannot disclose the facts surrounding an examination, i.e., taxes collected and audit examination.").

Most importantly, the purported determination did not contain any information regarding the value of Myer's claim. If a claim is below the $2,000,000 threshold specified in 26 U.S.C. § 7623(b)(5)(B) it is referred to in the Treasury Regulations as a Section 7623(a) claim, and if it is over two-million-dollar threshold, it is a Section 7623(b) claim. *See* 26 C.F.R. § 301.7623-1(b) (awards under Section 7623(a); 26 C.F.R. § 301.7623-1(c) (awards under Section 7623(b)).

If the Commissioner rejects a Section 7623(a) claim, he will send a notice to the claimant stating the basis of the rejection, but if he denies the claim, the notice will not state the basis of the rejection. 26 C.F.R. § 301.7623-3(b)(3) ("The Whistleblower Office will provide written notice to the whistleblower of the rejection or denial of any award and, in the case of a rejection, the written notice will state the basis for the rejection."). However, for a Section 7623(b) claim, the Whistleblower Office will send a preliminary denial or rejection letter, stating the basis of the rejection or denial, allow the whistleblower the opportunity to comment within 30 days, and then issue a determination. 26 C.F.R. § 301.7623-3(c)(7)-(8).

This distinction is important. As the Commissioner noted in I.R.M. 25.2.2.7.1,[5] whether a claim is being rejected or denied is of crucial importance to a

[5] *Available at* https://www.irs.gov/irm/part25/irm_25-002-002 (last accessed May 7, 2018).

whistleblower and should be reflected in the determination, as well as whether the claim is a Section 7623(a) or Section 7623(b) claim. The Treasury Regulations and *Comparini* are also in conflict with each other. While the Treasury Regulations anticipate that a notice under 26 C.F.R. §§ 301.7623-(c)(7) or (8) would allow a whistleblower only to comment on a proposal from the Whistleblower Office, under *Comparini* such a notice would allow a whistleblower jurisdiction to adjudicate the claim in Tax Court. This is because of the broad definition of "determination" in *Comparini*.

Accordingly, the letters issued by the IRS Whistleblower Office were so bereft of information as to not qualify as a "determination" under Section 7623(b)(4).

B. A whistleblower determination must be mailed by certified mail and the Commissioner must affirmatively show with direct evidence of the mailing of the determination. In this case, the Commissioner failed to meet his evidentiary burden.

In cases involving the Tax Court's jurisdiction, the Tax Court requires the Commissioner to provide direct evidence of the date and fact of the mailing of the notice to a taxpayer. *Magazine v. Comm'r*, 89 T.C. 321, 326 (1987). Although "habit" evidence is generally admissible under the Federal Rules of Evidence it is insufficient alone to demonstrate that mailing occurred for jurisdiction purposes. *Id.* *Magazine*

specifically dealt with evidence of the mailing of a Notice of Deficiency under 26 U.S.C. §§ 6212-6213.

Magazine stands for the proposition that testimonial evidence regarding the mailing is insufficient to establish the date and fact of a mailing. *United Stated v. Arford*, 1992 U.S. Dist. LEXIS 19749, at *11, 71 A.F.T.R.2d (RIA) 718 (D. Idaho 1992). Direct evidence means documentary evidence containing the proof of mailing which by itself establishes the fact of the mailing. A date stamped copy of a notice and a memorandum describing the mailing are, for example, indirect evidence of a mailing. *United States v. Wright*, 658 F. Supp. 1, 2 (D. Alaska 1986).

Magazine has been subsequently interpreted to indicate that "[a] properly completed U.S.P.S. Form 3877 represents direct documentary evidence of the date and fact of mailing". *Ruddy v. Comm'r,* T.C. Memo 2017-39, at *8 (2017). The Tax Court in *Ruddy* explained that a Form 3877, alone, will establish proof of mailing absent evidence to the contrary presented by a taxpayer. *Id.*; *see also Coleman v. Comm'r,* 94 T.C. 82, 90 (1990). A Form 3877 is the form used by the United States Postal Service to indicate that a mailing is certified, and a statutory notice of deficiency will generally indicate the certified mailing number on the face of the notice. *Ruddy*, T.C. Memo 2017-39, at *10.

The Court of Appeals for Federal Circuit has noted that as an alternative to providing a completed U.S.P.S. Form 3877, the IRS may produce evidence that is "otherwise sufficient" to demonstrate that the mailing occurred. *Welch v. United States*, 678 F.3d 1371, 1377 (Fed. Cir. 2012). The Federal Circuit in *Welch* reviewed what other circuits and the Tax Court had held constituted "otherwise sufficient" direct evidence of mailing.

The court in *Welch* formulated the following analysis. *First*, the government bears the burden of proving proper mailing of a notice of deficiency by "competent and persuasive evidence". *Id.* at 1378. *Second*, the IRS can meet that burden by establishing the existence of the notice of deficiency and providing a properly completed PS Form 3877. *Id.* *Third*, and finally:

> In the absence of a properly completed [US]PS Form 3877, where the existence of a notice of deficiency is not in dispute, the government must come forward with evidence corroborating an actual timely mailing of the notice of deficiency. The evidence presented to prove timely mailing may include documentary evidence as well as evidence of mailing practices corroborated by direct testimony... But that evidence must directly corroborate the mailing of the specific notice of deficiency at issue on a date certain.

Id. at 1378-1379 (internal citations omitted).

Section 7623(b)(4) provides that a person may appeal an award determination of a whistleblower claim within thirty days of such mailing of the notice. This statute is much less specific than the statute describing the mailing requirement for a notice

of deficiency, however, both statutes have been held to be jurisdictional in nature[6] with respect to the Tax Court and therefore the requirements set forth in *Magazine* have been used to ascertain if a determination of a whistleblower award has been properly mailed. *Kasper v. Comm'r*, 137 T.C. 37, 45 (2011).

When moving to dismiss a whistleblower petition, the Commissioner "must show through direct evidence that the Whistleblower Office mailed the final determination letter more than 30 days before petitioner filed the petition." *Allibone v. Comm'r*, T.C. Memo 2016-91, at *4 (2016). The Tax Court in *Allibone* described the requirements of this affirmative showing in greater detail:

> Respondent relies on records that Mr. Mitzel [the Whistleblower Office employee] created (e-trak entries and a declaration attached to the motion) which show that, assuming the Whistleblower Office's standard business practices were followed here, the final determination letter was mailed on May 6, 2015. Respondent has not produced a certified mailing receipt or any other direct evidence showing that the final determination letter was mailed on May 6, 2015 (or any other date). Thus, respondent relies on the standard operating procedures within the Whistleblower Office to establish the mailing date at issue here.

Id. at 4-5.

The Tax Court goes on to state that the record demonstrated that a telephone call may have been made to the whistleblower. The Tax Court then rejects the

[6] As discussed below, the holding below that the thirty-day time period in Section 7623(b)(4) is jurisdictional cannot be squared with recent Supreme Court case law.

contention that such is sufficient, stating that a telephone call and e-trak records do not constitute direct evidence of mailing.

A statutory notice of deficiency must be mailed to a taxpayer at his or her last known address. 26 U.S.C. § 6212(a). In *Friedland v. Comm'r,* T.C. Memo 2011-217, at *3 (2011) the Tax Court relied on *Mulvania v. Comm'r,* 81 T.C. 65, 69 (1983), which interpreted the requirement that a notice of deficiency be mailed to the last known address of a taxpayer to only require that a taxpayer actually receive, in a timely fashion, the notice of deficiency. However, the Tax Court in *Friedland* failed to distinguish between *Mulvania*, which interprets the last known address requirement of 26 U.S.C. § 6212(a) and *Magazine* which discusses the burden of proof required to demonstrate the fact of mailing itself.

With respect to determination of a whistleblower award, it is the fact of the mailing, not the address, which is pertinent for the Tax Court's jurisdiction. This is because if the determination was not mailed, there is no attendant Tax Court jurisdiction. In this context, the Federal Circuit's decision in *Welch* is instructive because it is the Commissioner's burden to initially demonstrate the fact of the mailing of a determination under Section 7623(b)(4). This can be done by either (a) producing a U.S.P.S. Form 3877 and the determination or (b) produce evidence that

demonstrates that the determination was mailed on a specific date certain (e.g. a U.S.P.S. certified return receipt).

Additionally, as the Tax Court noted in *Whistleblower 26876-15W v. Comm'r*, 147 T.C. No. 12, at *7 (2016), that the requirements of a determination in the context of Section 7623(b)(4) are very similar to the jurisdictional requirement of a determination in a collection due process ("C.D.P.") hearing as found in 26 U.S.C. § 6330(d). This notice is required to be in writing. *Lunsford v. Comm'r*, 117 T.C. 159, 161 (2001). The Tax Court has further held that:

> Although section 6330(d) does not specify the means by which the Commissioner is required to give notice of a determination made under sections 6320 and 6330, we conclude that the method that Congress specifically authorized for sending notices of deficiency in section 6212(a) and (b) certainly should suffice. Accordingly, we hold that a notice of determination issued pursuant to sections 6320 and/or 6330 *is sufficient if such notice is sent by certified or registered mail* to a taxpayer at the taxpayer's last known address.

Weber v. Comm'r, 122 T.C. 258, 261-62 (2004) (emphasis added). *Weber* is instructive as to Section 7623(b)(4) because, like Section 6330(d), Section 7623(b)(4) contains no specific instructions as to how and where a determination must be mailed.

Because the mailing of the whistleblower determination has been held to be jurisdictional, it is insufficient to simply allege that Myers in fact received the notice. It is not the receipt of the determination which creates the jurisdiction of the Tax Court, but the Commissioner's mailing of notice. *See Weber, supra*. In order to

demonstrate that a determination was mailed, the Commissioner must provide direct evidence of that mailing in the form of U.S.P.S. Form 3877 or other evidence which demonstrates the fact of the mailing. Such proof was lacking below; accordingly, the Court must vacate the decision below and remand with instructions to issue a decision that the Tax Court lacked jurisdiction not because Myers failed to timely petition the Tax Court, but instead because the IRS Whistleblower Office had failed to provide Myers with his "ticket to Tax Court."

C. The thirty-day deadline in Section 7623(b)(4) is not jurisdictional, rather, it is an affirmative defense.

In *Arbaugh v. Y&H Corp.* 546 U.S. 500, 516 (2006) the Supreme Court established an "administrable bright line" rule to determine if a statute establishes a jurisdictional requirement. In order for a statute's scope to be jurisdictional, the Congress must "clearly" state that "a threshold limitation" is jurisdictional and absent such clear instruction "courts should treat the restriction as nonjurisdictional in character." *Id.* at 515-516. In other words, not every limitation on a court's ability to hear a case is jurisdictional in nature, and such limitations should not be considered jurisdictional unless the Legislature expressed a clear intention that a requirement is jurisdictional.

For example, 26 U.S.C. § 7433(d) contains a limitation that prior to bringing a suit for an unauthorized collection action against the IRS, a taxpayer must exhaust

his or her administrative remedies. In *Hassen v. Government of the Virgin Islands*, 861 F.3d 108, 114 (3d Cir. 2017) the Third Circuit Court of Appeals compared the language of 26 U.S.C. § 7433(d) (providing for civil actions for unauthorized collections actions) with that of 26 U.S.C. § 7422(a) (providing for civil actions for tax refunds).[7] The Third Circuit found that the language of Section 7433(d) referred to a predicate for a judgment for damages while Section 7422(a) refers whether suit or proceeding may "maintained in any court." *Hassen*, 861 F.3d at 114. Therefore, the *Hassen* court ultimately concluded that Section 7433(d) was not jurisdictional in nature. *Id.* This Court should find the rationale of *Hassen* to be applicable to Section 7623(b)(4) and the case at bar.

In construing Section 7623(b)(4), this Court must use the "bright line" approach set forth by the Supreme Court in *Arbaugh*. Recently, the Supreme Court has explained that "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). *Wong* follows the general rule that so-called "claim processing rules" should not be considered jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Claim processing rules "are rules that seek to promote the

[7] Section 7422 permits a taxpayer to sue for a refund after exhaustion of administrative remedies (i.e, filing a claim for refund).

orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* Filing deadlines "are quintessential claim-processing rules." *Id.*

In parsing Section 7623(b), the Tax Court determined that the dollar value limitations in Section 7623(b)(5) are not jurisdictional bars on the Tax Court's jurisdiction. *Lippolis v. Comm'r,* 143 T.C. 393, 396 (2014). Whether the thirty-day limitation contained in Section 7623(b)(4) is a jurisdictional bar presents a closer question, though, because the Tax Court's jurisdiction is mentioned in subsection (b)(4), but not in (b)(5).

In general, the Tax Court's rule is that the court is "inclined to adopt a construction which will permit us to retain jurisdiction without doing violence to the statutory language." *Traxler v. Comm'r,* 61 T.C. 97, 100 (1973). Recently, the Tax Court has explained that "[i]n determining whether we have jurisdiction over a given matter, this Court and the Courts of Appeals have given our jurisdictional provisions a broad, practical construction rather than a narrow, technical one." *Pearson v. Comm'r,* 149 T.C. No. 20, at *7 (2017).

There are, however, some time limitations in the Internal Revenue Code which are interpreted to be jurisdictional, for example the Tax Court's jurisdiction to hear a petition to redetermine a notice of deficiency. *Satovsky v. Comm'r*, 1 B.T.A. 22, 24

(1924); *Block v. Comm'r*, 2 T.C. 761, 762 (1943). Most notably for the purposes of interpreting Section 7623(b)(4), the time limitation contained in Section 6330(d) (for bringing a petition for the redetermination of a determination in a CDP Hearing), has been treated as jurisdictional by the Tax Court. *Guralnik v. Comm'r*, 146 T.C. 230, 237 (2016).

As discussed above, the statutory language in Section 6330(d) and Section 7623(b)(4) is strikingly similar. However, the Tax Court in *Guralnik* misinterpreted the Supreme Court's rule in *Henderson*, consequently, Tax Court's interpretation of Section 6330(d) should not be treated as persuasive for this Court's interpretation of Section 7623(b)(4). This is so because the Tax Court in *Guralnik* erred in applying its analysis of Section 6213(a) to Section 6330(d). The error was that the jurisdiction language in Section 6213(a) is specifically predicated on a "timely" petition being filed in the Tax Court.

Conversely, in both Section 6330(d)'s and Section 7623(b)(4)'s thirty-day period for filing the petition is separately stated from the statement of the jurisdiction of the Tax Court. In each of these statutes the jurisdiction of the Tax Court (described in a parenthetical)[8] is set forth as a general jurisdiction over the claim, not, specific

[8] *Compare* 26 U.S.C. § 6330(d) ("The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).") *with* 26 U.S.C. §

jurisdiction over a "timely" claim. In both statutes Congress stated that the "Tax Court *shall* have jurisdiction with respect to such matter" (emphasis added), and this statement of jurisdiction is unqualified. Therefore, the appropriate reading of the thirty-day limitation in Section 7623(b)(4) is that the limitation is a non-jurisdictional claim processing rule.

In *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013) the Supreme Court addressed a similar situation to the case at bar, i.e., whether a portion of a statute that sets forth a timely filing condition was jurisdictional. In *Auburn Regional* a single sentence at 42 U.S.C. § 1395oo(a) allowed Medicare providers to seek review before certain boards of disputes concerning under-reimbursement. Subsection (a) begins with words allowing the providers to bring such actions "if" three conditions are met in the numbered paragraphs that end the sentence. *See* 42 U.S.C. § 1395oo(a)(1)-(3). The Supreme Court in *Auburn Regional* held the time to file condition at paragraph (3) nonjurisdictional, despite its being in the same sentence as the words preceding "if" and the two other conditions in paragraphs (1) and (2) that follow "if." The Supreme Court rejected the amicus' argument that the conditions of paragraphs (1) and (2) were jurisdictional. *Id.* at 155. Importantly, the Supreme

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7623(b)(4) ("Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).")

Court observed that "[a] requirement we would otherwise classify as nonjurisdictional, *... does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions*." *Id.* (internal citations omitted, emphasis added).

In this case, Section 7623(b)(4) contains no "if" language; indeed, there is no implication in the statute that the thirty-day filing requirement is inextricably intertwined with the Tax Court's jurisdictional grant. Under the rules of construction utilized by the Supreme Court in *Wong*, and *Auburn Regional*, the appropriate broad reading of the parenetical in Section 7623(b)(4) is to confer jurisdiction on the Tax Court. A more natural interpretation of Section 7623(b)(4), therefore, is to read the jurisdictional grant to the Tax Court (to generally hear appeals of whistleblower claims) as separate from the requirement that a petition relating to such claim be filed within the thirty days of the IRS determination of that claim. Therefore, the allegation that a petition was not timely filed should be treated as an affirmative defense rather than a jurisdictional bar.

II. EQUITABLE TOLLING APPLIES TO CLAIMS UNDER SECTION 7623(b)(4), AND THE FACTS OF THIS CASE CALL FOR EQUITABLE TOLLING.

Equitable tolling can be applied to the government in certain circumstances when a time limit is nonjurisdictional. In *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to

suits against the United States." *Id.* at 95-96. The *Irwin* presumption applies to Section 7623(b)(4) for several reasons: (1) the Tax Court is not a tribunal where sophisticated, well-represented repeat litigants are involved in whistleblower claim cases; (2) the statute is a simple one with no exceptions; (3) there would be no significant administrative problems if the Tax Court were asked to inquire into equitable tolling in the few whistleblower petitions filed late each year. Under the facts of this case, equitable tolling should apply here to render Myers's filing timely (in the alternative the Court should remand to the Tax Court to address equitable tolling in the first instance).

In *Irwin*, the Supreme Court held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin,* 498 U.S. at 95-96. However, the *Auburn Regional* decision held that the *Irwin* presumption does not apply in all tribunals. In *Auburn Regional,* the Supreme Court found the 180-day statutory deadline for Medicare providers to file for an administrative hearing is not subject to equitable tolling. *Auburn Regional*, 568 U.S. at 161.

The Supreme Court noted that it generally applied the *Irwin* presumption in favor of equitable tolling to filing deadlines in federal courts and had never before applied the *Irwin* presumption to an agency's internal appeal deadline. *Id.* at 159-60.

The Supreme Court distinguished the statute at issue from the types of "remedial" statutory schemes where the *Irwin* presumption had been applied, including schemes which were "unusually protective of claimants" and schemes where "laymen, unassisted by trained lawyers, initiate the process." *Id.* (internal citations and internal quotation marks omitted). Instead, the Supreme Court pointed out that the statutory scheme in question in *Auburn Regional* involved "'sophisticated' institutional providers assisted by legal counsel" that were "repeat players who elect to participate in the Medicare system ..." *Id.* (internal citation omitted). The High Court thus found that the *Irwin* presumption did not apply to "administrative appeals of the kind here considered." *Id.* at 161.

Auburn Regional does not lend itself to broad interpretation because the Supreme Court did not hold that *Irwin* never applied in non-Article III entities – just that *Irwin* did not apply in the particular type of administrative body where sophisticated, well-represented, repeat-playing parties elect to participate in the system. That the High Court did not intend to create a broad rule is evident from *Wong*, where, in 2015, the it held that under the Federal Tort Claim Act, the two-year period in which to file an administrative tort claim with a federal agency was subject to the *Irwin* presumption. *Wong*, 135 S. Ct. at 1633.

The considerations that caused the *Auburn Regional* Court to find *Irwin* inapplicable do not apply to the Tax Court. *Auburn Regional* may dictate that the *Irwin* presumption does not apply in certain administrative tribunals where sophisticated, well-represented parties litigate. However, the Tax Court is not that kind of tribunal, as most taxpayers there litigate *pro se* (as Myers did below). Unlike filings with the boards involved in *Auburn Regional,* petitions in the Tax Court are not typically filed by repeat-filing large corporations that are well-represented by counsel. Instead, Tax Court petitions are typically filed by *pro se*, individual taxpayers who have never petitioned the Tax Court before. The reasoning in *Auburn Regional* for finding that equitable tolling does not apply in cases involving repeat sophisticated litigants does not prevent this Court from applying the *Irwin* presumption in favor of equitable tolling to the time deadline contained in Section 7623(b)(4).

In *United States v. Brockamp,* 519 U.S. 347 (1997) the Supreme Court faced the issue of whether the three-year time limit for filing an administrative tax refund claim in Section 6511 was subject to equitable tolling. Without discussing whether the time period was jurisdictional, the *Brockamp* Court held that, even if the *Irwin* presumption applied to this time period, a combination of factors rebutted any presumption that equitable tolling could apply: (1) the time limits were set forth in an "unusually emphatic form," (2) the statute set forth the limitations in a "highly detailed technical

manner," by reiterating the limitations period in multiple subsections, (3) the statute specified numerous exceptions to the filing deadline, which did not include equitable tolling, (4) the granting of equitable tolling would require tolling substantive limitations on the amount of recovery, for which there was no direct precedent, and (5) granting equitable tolling could create serious administrative problems by forcing the IRS to respond to large numbers of late claims. *Brockamp*, 519 U.S. at 350-353.

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court revisited *Brockamp* when addressing whether the one-year statute of limitations for asking a federal district court to engage in habeas review of a state death penalty conviction was subject to equitable tolling. *Holland*, 560 U.S. at 634. In distinguishing the statute at issue (28 U.S.C. § 2254) from the one in *Brockamp*, the Supreme Court found that the presumption in favor of equitable tolling was not rebutted because (1) the language of the limitations provision was not unusually emphatic, (2) the statute did not "reiterate" its time limitation, (3) the one exception the statute enunciated (tolling during state collateral review proceedings) was a necessary procedural measure to account for exhaustion of state remedies, (4) the application of equitable tolling would not affect the substance of a habeas petitioner's claim, (5) the subject matter at issue, habeas corpus, pertains to an area in which equitable considerations often factor, unlike the area of refund claim administration. *Holland*, 560 U.S. at 635, 646-647.

The Supreme Court also noted that, although generous limitations periods may factor in overcoming the *Irwin* presumption, *see United States v. Beggerly*, 524 U.S. 38, 48 (1998) (12-year period), the period of one year was not particularly long. *Holland*, 560 U.S at 647.

Similarly, the Ninth Circuit, in *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), applied the *Brockamp* tests to the nine-month limitations period in which to file a wrongful levy suit in order to determine whether the *Irwin* presumption in favor of equitable tolling was rebutted. The Ninth Circuit found that the *Irwin* presumption had not been rebutted because (1) the language of the statute was not unusually emphatic, (2) the statute was not highly detailed or technical, (3) the statute contained only one exception that extended the limitations period, (4) the limitations period had no impact on substantive recovery, and (5) the tax-related nature of the statute was only one factor weighing against equitable tolling, which was overcome by the other factors weighing in favor of tolling. *Id.* at 1045-1046. The Ninth Circuit further noted that the nine-month limitation period was "relatively stingy" compared to the generous period of 12 years in *Beggerly* that the Supreme Court found was a factor in rebutting the *Irwin* presumption. *Volpicelli*, 777 F.3d at 1046.

The *Irwin* presumption is not rebutted in the instant case because the thirty-day limitation period of Section 7623(b)(4) shares more similarities with the statutes in

Holland and *Volpicelli* than with the statute in *Brockamp*. The *Irwin* presumption is not rebutted because (1) the language of Section 7623(b)(4) is not unusually emphatic, due to utilizing the less directive "may," instead of the "shall" used in *Brockamp, Holland,* and *Volpicelli*, (2) the statutory language is not "highly technical or detailed" and does not reiterate the limitations period in other sections, (3) the limitations period has no impact on substantive recovery because the amount of contestable tax recovery is not linked to the limitations period, unlike in *Brockamp* where the potential recoverable refund was limited to any tax paid within the three-year limitations period, and (4) if the tax-related nature of Section 7623(b)(4) is considered a factor weighing against the *Irwin* presumption, as in *Holland* where the presence of such factor was not dispositive, it should be weighed lightly, since the serious administrative problems envisioned by *Brockamp* do not exist with respect to whistleblower claims. Additionally, the short deadline of thirty days in Section 7623(b)(4) weighs in favor of applying the *Irwin* presumption. This thirty-day limitation is in stark contrast to the 12-year period in *Beggerly*. More importantly, the limitations period of thirty days is far less than the one-year period and nine-month period in *Holland* and *Volpicelli*, respectively, which the courts felt were short.

Further, the few number of whistleblower cases filed with the Tax Court under Section 7623(b)(4) militate in favor or construing Section 7623(b)(4)'s parenthetical

to be nonjurisdictional. In the IRS's most recent report to Congress, it acknowledged that that there were only 95 Section 7623(b) cases and 59 Section 7623(a) cases in litigation as of September 30, 2017. IRS WHISTLEBLOWER PROGRAM FYE 2017 REPORT, 2018 TNT 5-27 (at p. 15); *available at* https://www.irs.gov/pub/whistleblower/fy17_wo_annual_report_final.pdf (last accessed May 7, 2018). Thus, a holding that Section 7623(b)(4) is nonjurisdictional would not open up the floodgates of litigation in the Tax Court.

Moreover, the absence of any language in the determination letters/notices issued to Myers in this case informing him of the hard thirty-day timeline in Section 7623(b)(4) indicates why equitable tolling should be allowed. In *Glus v. Brooklyn*, 359 U.S. 231 (1959), the Supreme Court held that a defendant could be estopped from arguing that the plaintiff had brought his Federal Employers' Liability Act claim late under the statute of limitations if the plaintiff could prove at a hearing that, as he alleged, the defendant or his employees misled the plaintiff into the late filing. In *Irwin*, the Supreme Court, citing *Glus*, stated: "[w]e have allowed equitable tolling in situations where the . . . complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (footnotes omitted). *Accord Mannella v. Comm'r*, 631 F.3d 115, 125 (3d Cir. 2011) ("There may

be equitable tolling . . . where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action . . . .") (citations and internal quotation marks omitted).

Nowhere in any of the notices/letters sent to Myers in the case at bar was the Myer's right to petition in Tax Court even mentioned, let alone was Myers warned of the thirty-day deadline. *See* JA-043-45. Typically, if the IRS issues a "ticket to Tax Court" that fact is prominently displayed in the document in question. Both C.D.P. notices of determination and notices of deficiency under Section 6212(a) plainly state that a deadline to file in Tax Court exists. Notices of deficiency issued under Section 6212 have long stated: "If you want to contest this deficiency in court before making any payment, you have 90 days from the above date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency." *See Erickson v. Comm'r,* T.C. Memo 1991-97 at *21 (1991) (language from 1988 notice); *Rochelle v. Comm'r,* 116 T.C. 356, 357 (2001) (same, except for addition of the word "mailing" before "date" in language from 1999 notice). Additionally, notices of determination for Tax Court review of innocent spouse relief claims under Section 6015(e)(1) state: "You can contest our determination by filing a petition with the United States Tax Court. You have 90 days from the date of this letter to file your petition." *See Barnes v. Comm'r*, 130 T.C. 248, 250 (2008) (language from 2001 notice).

Finally, the Tax Court's decision failed to address Myer's equitable tolling argument and, correspondingly, failed to address this Court's extant jurisprudence that requires courts to analyze "whether a particular basis for suspending the running of the statute of limitations had received judicial recognition when the statute became law." *Maggio v. Wisconsin Ave. Psychiatric Ctr., Inc.*, 795 F.3d 57, 60 (D.C. Cir. 2015) (internal citation omitted). "If by then the judiciary had generally recognized it, a fair inference would be that Congress intended to permit the tolling of the statutory limitation in similar circumstances. If not, the courts cannot excuse a litigant's filing after the statutory deadline." *Id.*

In this case, Section 7623(b)(4) became part of the Internal Revenue Code in 2006. *See* The Tax Relief and Health Care Act of 2006, Pub. L. 109-432, 120 Stat. 2992. However, two years before Congress enacted Section 7623(b) the Supreme Court with *Kontrick v. Ryan*, 540 U.S. 433 (2004) started a sea-change in respect to whether filing deadlines were jurisdictional versus claims processing.

In analyzing equitable tolling in *Maggio* this Court asked "[w]as [equitable tolling] a generally recognized basis for tolling a limitations period in 1964 when Congress enacted this statute?" *Maggio*, 795 F.3d at 60. Applying the same analysis to this case requires this Court to ask if equitable tolling was a generally recognized basis for tolling the thirty-day limitations period in Section 7623(b)(4) in 2006 when

Congress enacted Section 7623(b)? The answer, based on *Kontrick*, and its progeny, is a clear "yes." Therefore, Section 7623(b)(4) was subject to equitable tolling and the Tax Court erred in failing to so hold.

Indeed, "[t]he Supreme Court has emphasized that equitable tolling must be applied flexibly, case by case, without retreating to 'mechanical rules' or 'archaic rigidity.'" *Menominee Indian Tribe of Wisconsin v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014), *aff'd,* 136 S. Ct. 750 (2016) (internal citation omitted). Accordingly, when this Court flexibly applies equitable tolling to the facts of this case it should allow equitable tolling of the Appellant's Petition below. In the alternative, the Court should remand to the Tax Court to consider equitable tolling in the first instance.

III. THE TAX COURT HAS THE POWER TO ORDER THE IRS TO ISSUE MYERS A DETERMINATION UNDER SECTION 7623(b)(4).

The Tax Court had jurisdiction — in light of 26 U.S.C. § 7623(b)(4) and under the Administrative Procedures Act ("A.P.A."), 5 U.S.C. § 706(1) — to "compel agency action unlawfully withheld or unreasonably delayed." Further, 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 this Court has held in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), 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."

Neither the Tax Court, nor this Court, have decided whether the reasoning in *Telecommunications Research and Action Center* (a/k/a "*TRAC*") (and its progeny) applies to the Tax Court and its jurisdiction under 26 U.S.C. § 7623(b)(4) (or any other Internal Revenue Code section for that matter). And neither this Court nor the Tax Court have decided whether, if the APA does not directly apply, there are cases that 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. Comm'r*, 122 T.C. 32, 54 (2004) (Thornton, *J.*, concurring).

However, there is no analytical basis that would justify not applying *TRAC* to the Tax Court in general, and Section 7623(b)(4) in particular.[9] *See also Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (where the Federal Circuit held that the All Writs Act is available to the Veterans Court).

In *TRAC*, this Court "held that where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Ukiah*

[9] Note – as this Court has exclusive appellate jurisdiction over Section 7623(b)(4) appeals this Court would be well within its discretion to address this issue now in order to clarify the nascent Section 7623(b)(4) jurisprudence.

Adventist Hosp. v. F.T.C., 981 F.2d 543, 549 (D.C. Cir. 1992) (internal citation and quotation marks omitted). *See also id.* at 550 ("*TRAC*-type cases have tended to focus on one category of nonfinal agency action—unreasonable agency delay.").

In this case it is undisputed that IRS whistleblower determinations are committed to the Tax Court pursuant to Section 7623(b)(4). Thus, because Section 7623(b)(4) commits Tax Court review of IRS Whistleblower Office action, any petition for relief that might affect the Tax Court's future jurisdiction is subject to the exclusive review by the Tax Court in the first instance. Accordingly, pursuant to the A.P.A. and the All Writs Act the Tax Court has the ability to compel the IRS Whistleblower Office to issue a notice of determination to claimants in general and Myers in particular.

In this case, because Myer's whistleblower claim has been pending for years, and because the letter(s) issued by the IRS Whistleblower Office were not *de jure* notice(s) of determination (*see* discussion *supra*), the Tax Court should have entered an order requiring the IRS Whistleblower Office to issue Myers his "ticket to Tax Court" under Section 7623(b)(4). In the alternative, the Court should remand this case to the Tax Court to apply *TRAC* and its progeny in the first instance to allow for fact finding/evidence taking so that this Court has a robust record for appellate review.

CONCLUSION

Based on the foregoing, Myer requests that this Court vacate the decision below and remand this case with instructions to the Tax Court to dismiss for want of jurisdiction based on the failure of the IRS Whistleblower Office to issue a notice of determination. Additionally, this Court should, pursuant to the A.P.A. and All Writs Act, remand with instructions to the Tax Court to order the IRS Whistleblower Office to issue a notice of determination. In the alternative, this Court should hold that Section 7623(b)(4) is nonjurisdictional and subject to equitable tolling.

Respectfully Submitted,

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.05.08 18:48:22 -04'00'

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Dated: May 8, 2019

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) counsel certifies that this brief is in compliance with the 13,000 type-volume limitation of Rule 32(a)(7)(B)(i). The instant brief is 10,805 words in length. The brief has been prepared using Microsoft Word, Goudy Old Style font in 14 point.

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.05.08 18:48:06 -04'00'
Joseph A. DiRuzzo, III

CERTIFICATE OF SERVICE

This is to certify that a copy of the opening brief was served on counsel for the appellee, Janet A. Bradley, by filing it with the CM/ECF system on May 8, 2018, of which she is a member. This is to certify that a copy of the Appellant's opening brief was served on counsel for the amicus, Carlton M. Smith, by filing it with the CM/ECF system on May 8, 2018, of which he is a member. All counsel in the case are members of the CM/ECF system. Pursuant to Circuit Rule 31 eight paper copies of the Appellant's opening brief will be provided to the Court.

Pursuant to Circuit Rule 30 the Joint Appendix will be filed on May 8, 2018, with the Clerk of Court via CM/ECF and seven paper copies of the Joint Appendix will be provided to the Court; a paper copy of the Joint Appendix together with a paper copy of the Appellant's opening brief will be provided to counsel for the appellee, Janet A. Bradley via USPS priority mail.

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2018.05.08 18:47:52 -04'00'
Joseph A. DiRuzzo, III

STATUTORY & REGULATORY ADDENDUM

Full text of 26 U.S.C. § 7623, 26 C.F.R. § 301.7623-1, 26 C.F.R. § 301.7623-3, and 26 U.S.C. § 6330, reproduced in full commencing on the next page.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 78. Discovery of Liability and Enforcement of Title
Subchapter B. General Powers and Duties

26 U.S.C.A. § 7623, I.R.C. § 7623

§ 7623. Expenses of detection of underpayments and fraud, etc.

Effective: February 9, 2018
Currentness

(a) In general.--The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for--

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) Awards to whistleblowers.--

(1) In general.--If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) Award in case of less substantial contribution.--

(A) In general.--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any

related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of information.--Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) Reduction in or denial of award.--If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) Appeal of award determination.--Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(5) Application of this subsection.--This subsection shall apply with respect to any action--

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and

(B) if the proceeds in dispute exceed $2,000,000.

(6) Additional rules.--

(A) No contract necessary.--No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

(B) Representation.--Any individual described in paragraph (1) or (2) may be represented by counsel.

(C) Submission of information.--No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.

(c) Proceeds.--For purposes of this section, the term “proceeds” includes--

(1) penalties, interest, additions to tax, and additional amounts provided under the internal revenue laws, and

(2) any proceeds arising from laws for which the Internal Revenue Service is authorized to administer, enforce, or investigate, including--

(A) criminal fines and civil forfeitures, and

(B) violations of reporting requirements.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 904; Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub.L. 104-168, Title XII, § 1209(a), July 30, 1996, 110 Stat. 1473; Pub.L. 109-432, Div. A, Title IV, § 406(a)(1), Dec. 20, 2006, 120 Stat. 2958; Pub.L. 115-123, Div. D, Title II, § 41108(a) to (c), Feb. 9, 2018, 132 Stat. 158.)

Notes of Decisions (45)

26 U.S.C.A. § 7623, 26 USCA § 7623
Current through P.L. 115-140. Also includes P.L. 115-158 to 115-163, 115-167 and 115-168. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U.

End of Document

26 C.F.R. § 301.7623–1, Treas. Reg. § 301.7623–1

§ 301.7623–1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award.

Effective: August 12, 2014
Currentness

(a) In general. In cases in which awards are not otherwise provided for by law, the Whistleblower Office may pay an award under section 7623(a), in a suitable amount, for information necessary for detecting underpayments of tax or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. In cases that satisfy the requirements of section 7623(b)(5) and (b)(6) and in which the Internal Revenue Service (IRS) proceeds with an administrative or judicial action based on information provided by an individual, the Whistleblower Office must determine and pay an award under section 7623(b)(1), (2), or (3). The awards provided for by section 7623 and this paragraph must be paid from collected proceeds, as defined in § 301.7623–2(d).

(b) Eligibility to file claim for award. (1) In general. Any individual, other than an individual described in paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4.

(2) Ineligible whistleblowers. The Whistleblower Office will reject any claim for award filed by an ineligible whistleblower and will provide written notice of the rejection to the whistleblower. The following individuals are not eligible to file a claim for award or receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4—

(i) An individual who is an employee of the Department of Treasury or was an employee of the Department of Treasury when the individual obtained the information on which the claim is based;

(ii) An individual who obtained the information through the individual's official duties as an employee of the Federal Government, or who is acting within the scope of those official duties as an employee of the Federal Government;

(iii) An individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information;

(iv) An individual who obtained or had access to the information based on a contract with the Federal Government; or

(v) An individual who filed a claim for award based on information obtained from an ineligible whistleblower for the purpose of avoiding the rejection of the claim that would have resulted if the claim was filed by the ineligible whistleblower.

(c) Submission of information and claims for award. (1) Submitting information. To be eligible to receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4, a whistleblower must submit to the IRS specific and credible information that the whistleblower believes will lead to collected proceeds from one or more persons whom the whistleblower believes have failed to comply with the internal revenue laws. In general, a whistleblower's submission should identify the person(s) believed to have failed to comply with the internal revenue laws and should provide substantive information, including all available documentation, that supports the whistleblower's allegations. Information that identifies a pass-through entity will be considered to also identify all persons with a direct or indirect interest in the entity. Information that identifies a member of a firm who promoted another identified person's participation in a transaction described and documented in the information provided will be considered to also identify the firm and all other members of the firm. Submissions that provide speculative information or that do not provide specific and credible information regarding tax underpayments or violations of internal revenue laws do not provide a basis for an award. If documents or supporting evidence are known to the whistleblower but are not in the whistleblower's control, then the whistleblower should describe the documents or supporting evidence and identify their location to the best of the whistleblower's ability. If all available information known to the whistleblower is not provided to the IRS by the whistleblower, then the whistleblower bears the risk that this information might not be considered by the Whistleblower Office for purposes of an award.

(2) Filing claim for award. To claim an award under section 7623 and §§ 301.7623–1 through 301.7623–4 for information provided to the IRS, a whistleblower must file a formal claim for award by completing and sending Form 211, "Application for Award for Original Information," to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. The Form 211 should be completed in its entirety and should include the following information—

(i) The date of the claim;

(ii) The whistleblower's name;

(iii) The whistleblower's address and telephone number;

(iv) The whistleblower's date of birth;

(v) The whistleblower's taxpayer identification number; and

(vi) An explanation of how the information on which the claim is based came to the attention and into the possession of the whistleblower, including, as available, the date(s) on which the whistleblower acquired the information and a complete description of the whistleblower's present or former relationship (if any) to person(s) identified on the Form 211.

(3) Under penalty of perjury. No award may be made under section 7623(b) unless the information on which the award is based is submitted to the IRS under penalty of perjury. All claims for award under section 7623 and §§ 301.7623–1 through 301.7623–4 must be accompanied by an original signed declaration under penalty of perjury, as follows: "I declare under penalty of perjury that I have examined this application, my accompanying statement, and supporting documentation and aver that such application is true, correct, and complete, to the best of my knowledge." This requirement precludes the filing of a claim for award by a person serving as a representative of, or in any way on behalf of, another individual. Claims filed by more than one whistleblower (joint claims) must be signed by each individual whistleblower under penalty of perjury.

(4) Perfecting claim for award. If a whistleblower files a claim for award that does not include information described under paragraph (c)(2) of this section, does not contain specific and credible information as described in paragraph (c)(1) of this section, or is based on information that was not submitted under penalty of perjury as required by paragraph (c)(3) of this section, the Whistleblower Office may reject the claim or notify the whistleblower of the deficiencies and provide the whistleblower an opportunity to perfect the claim for award. If a whistleblower does not perfect the claim for award within the time period specified by the Whistleblower Office, then the Whistleblower Office may reject the claim. If the Whistleblower Office rejects a claim, then the Whistleblower Office will provide notice of the rejection to the whistleblower pursuant to the rules of § 301.7623–3(b)(3) or (c)(7). If the Whistleblower Office rejects a claim for the reasons described in this paragraph, then the whistleblower may perfect and resubmit the claim.

(d) Request for assistance. (1) In general. The Whistleblower Office, the IRS, or IRS Office of Chief Counsel may request the assistance of a whistleblower or the whistleblower's legal representative. Any assistance shall be at the direction and control of the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel assigned to the matter. See § 301.6103(n)–2 for rules regarding written contracts among the IRS, whistleblowers, and legal representatives of whistleblowers.

(2) No agency relationship. Submitting information, filing a claim for award, or responding to a request for assistance does not create an agency relationship between a whistleblower and the Federal Government, nor does a whistleblower or the whistleblower's legal representative act in any way on behalf of the Federal Government.

(e) Confidentiality of whistleblowers. Under the informant's privilege, the IRS will use its best efforts to protect the identity of whistleblowers. In some circumstances, the IRS may need to reveal a whistleblower's identity, for example, when it is determined that it is in the best interests of the Government to use a whistleblower as a witness in a judicial proceeding. In those circumstances, the IRS will make every effort to notify the whistleblower before revealing the whistleblower's identity.

(f) Effective/applicability date. This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

Credits

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12796, June 19, 1972; T.D. 7297, 38 FR 34804, Dec. 19, 1973; T.D. 8737, 62 FR 53231, Oct. 14, 1997; T.D. 8780, 63 FR 44778, Aug. 21, 1998; T.D. 9580, 77 FR 10371, Feb. 22, 2012; T.D. 9687, 79 FR 47264, Aug. 12, 2014]

SOURCE: 32 FR 15241, Nov. 3, 1967; T.D. 9610, 78 FR 5994, Jan. 28, 2013; T.D. 9628, 78 FR 49369, Aug. 14, 2013; T.D. 9679, 79 FR 41891, July 18, 2014; T.D. 9687, 79 FR 47264, Aug. 12, 2014; T.D. 9764, 81 FR 25334, April 28, 2016; T.D. 9768, 81 FR 27322, May 6, 2016; T.D. 9780, 81 FR 51797, Aug. 5, 2016, unless otherwise noted.

AUTHORITY: 26 U.S.C. 7805.; Section 301.1474–1 also issued under 26 U.S.C. 1474(f).; Section 301.6011–2 also issued under 26 U.S.C. 6011(e).; Section 301.6011–3 also issued under 26 U.S.C. 6011.; Section 301.6011–5 also issued under 26 U.S.C. 6011.; Section 301.6011–6 also issued under 26 U.S.C. 6011(a).; Section 301.6011–7 also issued under 26 U.S.C. 6011(e).; Section 301.6033–4 also issued under 26 U.S.C. 6033.; Section 301.6036–1 also issued under 26 U.S.C. 6036.; Section 301.6037–2 also issued under 26 U.S.C. 6037.; Section 301.6039E–1 also issued under 26 U.S.C. 6039E.; Section 301.6050M–1 also issued under 26 U.S.C. 6050M.; Section 301.6061–1 also issued under 26 U.S.C. 6061.; Section 301.6081–2 also issued under 26 U.S.C. 6081(a).; Section 301.6103(c)–1 also issued under 26 U.S.C. 6103(c).; Section 301.6103(h)(4)–1 also issued under 26 U.S.C. 6103(h)(4) and 26 U.S.C. 6103(q).; Section 301.6103(j)(1)–1 also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(1)–1T also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(5)–1 also issued under 26 U.S.C. 6103(j)(5).; Section 301.6103(k)(6)–1 also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(6)–1T also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(9)–1 also issued under 26 U.S.C. 6103(k)(9) and 26 U.S.C. 6103(q).; Section 301.6103(l)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(l)(14)–1 also issued under 26 U.S.C. 6103(l)(14).; Section 301.6103(l)(21)–(1) also issued under 26 U.S.C. 6103(l)(21) and 6103(q).; Section 301.6103(m)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–1 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–2T also issued under 26 U.S.C. 6103(n).; Section 301.6103(p)(2)(B)–1 also issued under 26 U.S.C. 6103(p)(2).; Section 301.6103(p)(2)(B)–1T also issued under 26 U.S.C. 6103(p)(2).; Sections 301.6103(p)(4)–1 and 301.6103(p)(7)–1T also issued under 26 U.S.C. 6103(p)(4) and (7) and (q).; Section 301.6104(a)–6(d) is also issued under 5 U.S.C. 552.; Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–2 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–3 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–4 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6104(d)–5 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6109–1 also issued under 26 U.S.C. 6109 (a), (c), and (d).; Section 301.6109–3 also issued under 26 U.S.C. 6109.; Section 301.6111–1T also issued under 26 U.S.C. 6111.; Section 301.6111–2T also issued under 26 U.S.C. 6111(f)(4).; Section 301.6111–3 also issued under 26 U.S.C. 6111.; Section 301.6111–3T also issued under 26 U.S.C. 6111.; Section 301.6112–1T also issued under 26 U.S.C. 6112.; Section 301.6114–1 also issued under 26 U.S.C. 6114.; Section 301.6222(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).; Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(g)–1T also issued under 26 U.S.C. 6223(g) and 6230 (i) and (k).; Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1 is also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1T is also issued under 26 U.S.C. § 6230(k).; Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).; Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section

301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).; Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.; Section 301.6241–1T also issued under 26 U.S.C. 6241.; Section 301.6245–1T also issued under 26 U.S.C. 6245.; Section 301.6311–2 also issued under 26 U.S.C. 6311.; Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).; Section 301.6325–1T also issued under 26 U.S.C. 6326.; Section 301.6343–1 also issued under 26 U.S.C. 6343.; Section 301.6343–2 also issued under 26 U.S.C. 6343.; Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.; Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.; Section 301.6404–3 also issued under 26 U.S.C. 6404(f)(3).; Section 301.6621–1 also issued under 26 U.S.C. 6230(k).; Section 301.6689–1T also issued under 26 U.S.C. 6689(a).; Section 301.6708–1 also issued under 26 U.S.C. 6708.; Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).; Section 301.7216–3T also issued under 26 U.S.C. 7216.; Section 301.7502–1 also issued under 26 U.S.C. 7502.; Section 301.7502–2 also issued under 26 U.S.C. 7502.; Section 301.7507–1 also issued under 26 U.S.C. 597.; Section 301.7507–9 also issued under 26 U.S.C. 597.; Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).; Section 301.7508A–1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).; Section 301.7605–1 also issued under Section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.; Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.; Section 301.7624–1 also issued under 26 U.S.C. 7624.; Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).; Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).; Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).; Section 301.7705–1T also issued under 26 U.S.C. 7705(h).; Section 301.7705–2T also issued under 26 U.S.C. 7705(h).; Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–6 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9100–1T also issued under 26 U.S.C. 6081.; Section 301.9100–2T also issued under 26 U.S.C. 6081.; Section 301.9100–3T also issued under 26 U.S.C. 6081.; Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).; Section 301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.; Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324 [So in original; probably should read "102 Stat. 3342".], sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).; Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).; Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).; Section 301.9100–16T also issued under 26 U.S.C. 463(d).; Section 301.9100–22T is also issued under section 1101(g)(4) of Public Law 114–74.

Notes of Decisions (35)

Current through May 3, 2018; 83 FR 19463.

End of Document

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter F. Procedure and Administration
Part 301. Procedure and Administration (Refs & Annos)
Discovery of Liability and Enforcement of Title
General Powers and Duties

26 C.F.R. § 301.7623–3, Treas. Reg. § 301.7623–3

§ 301.7623–3 Whistleblower administrative proceedings and appeals of award determinations.

Effective: August 12, 2014
Currentness

(a) In general. The Whistleblower Office will pay awards under section 7623(a) and determine and pay awards under section 7623(b) in whistleblower administrative proceedings pursuant to the rules of this section. The whistleblower administrative proceedings described in this section are administrative proceedings pertaining to tax administration for purposes of section 6103(h)(4). See § 301.6103(h)(4)–1 for additional rules regarding disclosures of return information in whistleblower administrative proceedings. The Whistleblower Office may determine awards for claims involving multiple actions in a single whistleblower administrative proceeding. For purposes of the whistleblower administrative proceedings for rejections and denials, described in paragraphs (b)(3), (c)(7), and (c)(8) of this section, the Internal Revenue Service (IRS) may rely on the whistleblower's description of the amount owed by the taxpayer(s). The IRS may, however, rely on other information as necessary (for example, when the alleged amount in dispute is below the $2 million threshold of section 7623(b)(5)(B), but the actual amount in dispute is above the threshold).

(b) Awards under section 7623(a). (1) Preliminary award recommendation. In cases in which the Whistleblower Office recommends payment of an award under section 7623(a), the Whistleblower Office will communicate a preliminary award recommendation under section 7623(a) and §§ 301.7623–1 through 301.7623–4 to the whistleblower by sending a preliminary award recommendation letter that states the Whistleblower Office's preliminary computation of the amount of collected proceeds, recommended award percentage, recommended award amount (even in cases when the application of § 301.7623–4 results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage. The whistleblower administrative proceeding described in paragraphs (b)(1) and (2) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary award recommendation to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and pay an award, pursuant to paragraph (b)(2) of this section.

(2) Decision letter. At the conclusion of the process described in paragraph (b)(1) of this section, and when there is a final determination of tax, as defined in § 301.7623–4(d)(2), the Whistleblower Office will pay an award under section 7623(a) and §§ 301.7623–1 through 301.7623–4. The Whistleblower Office will communicate the amount of the award to the whistleblower in a decision letter.

(3) Rejections and denials. If the Whistleblower Office rejects a claim for award under section 7623(a), pursuant to § 301.7623–1(b) or (c), or if the IRS either did not proceed based on information provided by the whistleblower, as defined in § 301.7623–2(b), or did not collect proceeds, as defined in § 301.7623–2(d), then the Whistleblower Office will not apply the rules of paragraphs (b)(1) or (2) of this section. The Whistleblower Office will provide written notice to the whistleblower of the rejection or denial of any award and, in the case of a rejection, the written notice will state the basis for the rejection.

(c) Awards under section 7623(b). (1) Preliminary award recommendation. For claims under section 7623(b) other than those described in paragraphs (c)(7) and (c)(8) of this section (rejections and denials), the Whistleblower Office will prepare a preliminary award recommendation based on the Whistleblower Office's review of the administrative claim file and the application of the rules of section 7623 and §§ 301.7623–1 through 301.7623–4 to the facts of the case. See paragraph (e)(2) of this section for a description of the administrative claim file. The whistleblower administrative proceeding described in paragraphs (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. The preliminary award recommendation is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The preliminary award recommendation will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in § 301.7623–4(d)(2).

(2) Contents of preliminary award recommendation. The Whistleblower Office will communicate the preliminary award recommendation under section 7623(b) to the whistleblower by sending—

(i) A preliminary award recommendation letter that describes the whistleblower's options for responding to the preliminary award recommendation;

(ii) A summary report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, the recommended award amount (even in cases when the application of section 7623(b)(2) or section 7623(b)(3) results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage;

(iii) An award consent form; and

(iv) A confidentiality agreement.

(3) Opportunity to respond to preliminary award recommendation. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the preliminary award recommendation letter to respond to the preliminary award recommendation in one of the following ways—

(i) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(ii) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(iii) If the whistleblower signs, dates, and returns the confidentiality agreement, then the Whistleblower Office will provide the whistleblower with a detailed award report, and an opportunity to review documents supporting the report pursuant to paragraphs (c)(4) and (5) of this section, and any comments submitted by the whistleblower will be added to the administrative claim file; or

(iv) If the whistleblower submits comments on the preliminary award recommendation to the Whistleblower Office, but does not sign, date, and return the confidentiality agreement, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(4) Detailed report. (i) Contents of detailed report. If the whistleblower signs, dates, and returns the confidentiality agreement accompanying the preliminary award recommendation under section 7623(b), pursuant to paragraph (c)(3) of this section, then the Whistleblower Office will send the whistleblower—

(A) A detailed report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, and the recommended award amount, and provides a full explanation of the factors that contributed to the recommended award percentage;

(B) Instructions for scheduling an appointment for the whistleblower (and the whistleblower's legal representative, if any) to review information in the administrative claim file that is not protected by one or more common law or statutory privileges; and

(C) An award consent form.

(ii) Opportunity to respond to detailed report. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the detailed report to respond in one of the following ways—

(A) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(B) If the whistleblower requests an appointment to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges, then a meeting will be arranged pursuant to paragraph (c)(5) of this section;

(C) If the whistleblower does not request an appointment but does submit comments on the detailed report to the Whistleblower Office, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination pursuant to paragraph (c)(6) of this section; or

(D) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section.

(iii) Additional rules. The detailed report is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The detailed report will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in § 301.7623–4(d)(2).

(5) Opportunity to review documents supporting award report recommendations. Appointments for the whistleblower (and the whistleblower's legal representative, if any) to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges will be held at the Whistleblower Office in Washington, DC, unless the Whistleblower Office, in its sole discretion, decides to hold the meeting at another location. At the appointment, the Whistleblower Office will provide for viewing the information from the administrative claim file. The Whistleblower Office will supervise the whistleblower's review of the information and the whistleblower will not be permitted to make copies of any documents or other information. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date of the appointment to submit comments on the detailed report and the documents reviewed at the appointment to the Whistleblower Office. All comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(6) Determination letter. After the whistleblower's participation in the whistleblower administrative proceeding, pursuant to paragraph (c) of this section, has concluded, and there is a final determination of tax, as defined in § 301.7623–4(d)(2), a Whistleblower Office official will determine the amount of the award under section 7623(b)(1), (2), or (3), and §§ 301.7623–1 through 301.7623–4, based on the official's review of the administrative claim file. The Whistleblower Office will communicate the award to the whistleblower in a determination letter, stating the amount of the award. If, however, the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the award determination, pursuant to section 7623(b)(4) and paragraph (d) of this section, then the Whistleblower Office will not send the whistleblower a determination letter and will make payment of the award as promptly as circumstances permit.

(7) Rejections. A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. If the Whistleblower Office rejects a claim for award under section 7623(b), pursuant to § 301.7623–1(b) or (c), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary rejection letter that states the basis for the rejection of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary rejection letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary rejection letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal

representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the rejection of the claim, including the basis for the rejection, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(8) Denials. A denial is a determination that relates to or implicates taxpayer information. If, with respect to a claim for award under section 7623(b), the IRS either did not proceed based on the information provided by the whistleblower, as defined in § 301.7623–2(b), or did not collect proceeds, as defined in § 301.7623–2(d), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary denial letter that states the basis for the denial of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary denial letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary denial letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the denial of any award, including the basis for the denial, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(d) Appeal of award determination. Any determination regarding an award under section 7623(b)(1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court.

(e) Administrative record. (1) In general. The administrative record comprises all information contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges.

(2) Administrative claim file. The administrative claim file will include the following materials relating to the action(s) to which the determination relates—

(i) The Form 211, "Application for Award for Original Information," filed by the whistleblower and all information provided by the whistleblower (whether provided with the whistleblower's original submission or through a subsequent contact with the IRS).

(ii) Copies of all debriefing notes and recorded interviews held with the whistleblower (and the whistleblower's legal representative, if any).

(iii) Form(s) 11369, "Confidential Evaluation Report on Claim for Award," including narratives prepared by the relevant IRS office(s), explaining the whistleblower's contributions to the actions and documenting the actions taken by the IRS in the case(s). The Form 11369 will refer to and incorporate additional documents relating to the issues raised by the claim, as appropriate, including, for example, relevant portions of revenue agent reports, copies of agreements entered into with the taxpayer(s), tax returns, and activity records.

(iv) Copies of all contracts entered into among the IRS, the whistleblower, and the whistleblower's legal representative (if any), and an explanation of the cooperation provided by the whistleblower (or the whistleblower's legal representative, if any) under the contract.

(v) Any information that reflects actions by the whistleblower that may have had a negative impact on the IRS's ability to examine the taxpayer(s).

(vi) All correspondence and documents sent by the Whistleblower Office to the whistleblower.

(vii) All notes, memoranda, and other documents made by officers and employees of the Whistleblower Office and considered by the official making the award determination.

(viii) All correspondence and documents received by the Whistleblower Office from the whistleblower (and the whistleblower's legal representative, if any) in the course of the whistleblower administrative proceeding.

(ix) All other information considered by the official making the award determination.

(f) Effective/applicability date. This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

Credits

[T.D. 9687, 79 FR 47268, Aug. 12, 2014]

SOURCE: 32 FR 15241, Nov. 3, 1967; T.D. 9610, 78 FR 5994, Jan. 28, 2013; T.D. 9628, 78 FR 49369, Aug. 14, 2013; T.D. 9679, 79 FR 41891, July 18, 2014; T.D. 9687, 79 FR 47264, Aug. 12, 2014; T.D. 9764, 81 FR 25334, April 28, 2016; T.D. 9768, 81 FR 27322, May 6, 2016; T.D. 9780, 81 FR 51797, Aug. 5, 2016, unless otherwise noted.

AUTHORITY: 26 U.S.C. 7805.; Section 301.1474–1 also issued under 26 U.S.C. 1474(f).; Section 301.6011–2 also issued under 26 U.S.C. 6011(e).; Section 301.6011–3 also issued under 26 U.S.C. 6011.; Section 301.6011–5 also issued under 26 U.S.C. 6011.; Section 301.6011–6 also issued under 26 U.S.C. 6011(a).; Section 301.6011–7 also issued under 26 U.S.C. 6011(e).; Section 301.6033–4 also issued under 26 U.S.C. 6033.; Section 301.6036–1 also issued under 26 U.S.C. 6036.; Section 301.6037–2 also issued under 26 U.S.C. 6037.; Section 301.6039E–1 also issued under 26 U.S.C. 6039E.; Section 301.6050M–1 also issued under 26 U.S.C. 6050M.; Section 301.6061–1 also issued under 26 U.S.C. 6061.; Section 301.6081–2 also issued under 26 U.S.C. 6081(a).; Section 301.6103(c)–1 also issued under 26 U.S.C. 6103(c).; Section 301.6103(h)(4)–1 also issued under 26 U.S.C. 6103(h)(4) and 26 U.S.C. 6103(q).; Section 301.6103(j)(1)–1 also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(1)–1T also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(5)–1 also issued under 26 U.S.C. 6103(j)(5).; Section 301.6103(k)(6)–1 also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(6)–1T also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(9)–1 also issued under 26 U.S.C. 6103(k)(9) and 26 U.S.C. 6103(q).; Section 301.6103(l)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(l)(14)–1 also issued under 26 U.S.C. 6103(l)(14).; Section 301.6103(l)(21)–(1) also issued under 26 U.S.C. 6103(l)(21) and 6103(q).; Section 301.6103(m)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–1 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–2T also issued under 26 U.S.C. 6103(n).; Section 301.6103(p)(2)(B)–1 also issued under

26 U.S.C. 6103(p)(2).; Section 301.6103(p)(2)(B)–1T also issued under 26 U.S.C. 6103(p)(2).; Sections 301.6103(p)(4)–1 and 301.6103(p)(7)–1T also issued under 26 U.S.C. 6103(p)(4) and (7) and (q).; Section 301.6104(a)–6(d) is also issued under 5 U.S.C. 552.; Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–2 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–3 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–4 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6104(d)–5 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6109–1 also issued under 26 U.S.C. 6109 (a), (c), and (d).; Section 301.6109–3 also issued under 26 U.S.C. 6109.; Section 301.6111–1T also issued under 26 U.S.C. 6111.; Section 301.6111–2T also issued under 26 U.S.C. 6111(f)(4).; Section 301.6111–3 also issued under 26 U.S.C. 6111.; Section 301.6111–3T also issued under 26 U.S.C. 6111.; Section 301.6112–1T also issued under 26 U.S.C. 6112.; Section 301.6114–1 also issued under 26 U.S.C. 6114.; Section 301.6222(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).; Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(g)–1T also issued under 26 U.S.C. 6223(g) and 6230 (i) and (k).; Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1 is also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1T is also issued under 26 U.S.C. § 6230(k).; Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).; Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).; Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.; Section 301.6241–1T also issued under 26 U.S.C. 6241.; Section 301.6245–1T also issued under 26 U.S.C. 6245.; Section 301.6311–2 also issued under 26 U.S.C. 6311.; Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).; Section 301.6325–1T also issued under 26 U.S.C. 6326.; Section 301.6343–1 also issued under 26 U.S.C. 6343.; Section 301.6343–2 also issued under 26 U.S.C. 6343.; Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.; Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.; Section 301.6404–3 also issued under 26 U.S.C. 6404(f)(3).; Section 301.6621–1 also issued under 26 U.S.C. 6230(k).; Section 301.6689–1T also issued under 26 U.S.C. 6689(a).; Section 301.6708–1 also issued under 26 U.S.C. 6708.; Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).; Section 301.7216–3T also issued under 26 U.S.C. 7216.; Section 301.7502–1 also issued under 26 U.S.C. 7502.; Section 301.7502–2 also issued under 26 U.S.C. 7502.; Section 301.7507–1 also issued under 26 U.S.C. 597.; Section 301.7507–9 also issued under 26 U.S.C. 597.; Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).; Section 301.7508A–1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).; Section 301.7605–1 also issued under

Section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.; Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.; Section 301.7624–1 also issued under 26 U.S.C. 7624.; Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).; Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).; Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).; Section 301.7705–1T also issued under 26 U.S.C. 7705(h).; Section 301.7705–2T also issued under 26 U.S.C. 7705(h).; Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–6 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9100–1T also issued under 26 U.S.C. 6081.; Section 301.9100–2T also issued under 26 U.S.C. 6081.; Section 301.9100–3T also issued under 26 U.S.C. 6081.; Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).; Section 301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.; Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324 [So in original; probably should read “102 Stat. 3342”.], sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).; Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).; Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).; Section 301.9100–16T also issued under 26 U.S.C. 463(d).; Section 301.9100–22T is also issued under section 1101(g)(4) of Public Law 114–74.

Notes of Decisions (1)

Current through May 3, 2018; 83 FR 19463.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Enacted LegislationAmended by PL 115-141, March 23, 2018 , 132 Stat 348,

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 64. Collection
Subchapter D. Seizure of Property for Collection of Taxes
Part I. Due Process for Collections

26 U.S.C.A. § 6330, I.R.C. § 6330

§ 6330. Notice and opportunity for hearing before levy

Effective: January 1, 2018
Currentness

(a) Requirement of notice before levy.--

(1) In general.--No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice.--The notice required under paragraph (1) shall be--

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice.--The notice required under paragraph (1) shall include in simple and nontechnical terms--

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth--

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing.--

(1) In general.--If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period.--A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer.--The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing.--In the case of any hearing conducted under this section--

(1) Requirement of investigation.--The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.--

(A) In general.--The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including--

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.--The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination.--The determination by an appeals officer under this subsection shall take into consideration--

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded.--An issue may not be raised at the hearing if--

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding;

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A); or

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing.--

(1) Petition for review by Tax Court.--The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Suspension of running of period for filing petition in title 11 cases.--In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter, and [1]

(3) Jurisdiction retained at IRS Office of Appeals.--The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding--

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations.--

(1) In general.--Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal.--Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Exceptions.--If--

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,

(3) the Secretary has served a disqualified employment tax levy, or

(4) the Secretary has served a Federal contractor levy,

this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

(g) Frivolous requests for hearing, etc.--Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

(h) Definitions related to exceptions.--For purposes of subsection (f)--

(1) Disqualified employment tax levy.--A disqualified employment tax levy is any levy in connection with the collection of employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a hearing under this section with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served. For purposes of the preceding sentence, the term "employment taxes" means any taxes under chapter 21, 22, 23, or 24.

(2) Federal contractor levy.--A Federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor.

CREDIT(S)

(Added Pub.L. 105-206, Title III, § 3401(b), July 22, 1998, 112 Stat. 747; amended Pub.L. 106-554, § 1(a)(7) [Title III, § 313(b)(2)(A), (d)], Dec. 21, 2000, 114 Stat. 2763, 2763A-642, 2763a-643; Pub.L. 109-280, Title VIII, § 855(a), Aug. 17, 2006, 120 Stat. 1019; Pub.L. 109-432, Div. A, Title IV, § 407(b), Dec. 20, 2006, 120 Stat. 2961; Pub.L. 110-28, Title VIII, § 8243(a), (b), May 25, 2007, 121 Stat. 200; Pub.L. 111-240, Title II, § 2104(a) to (c), Sept. 27, 2010, 124 Stat. 2565; Pub.L. 114-74, Title XI, §1101(d), Nov. 2, 2015, 129 Stat. 637; Pub.L. 114-113, Div. Q, Title IV, § 424(b)(1), Dec. 18, 2015, 129 Stat. 3124.)

Notes of Decisions (1016)

Footnotes

1 So in original.

26 U.S.C.A. § 6330, 26 USCA § 6330

Current through P.L. 115-140. Also includes P.L. 115-158 to 115-163, 115-167 and 115-168. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U.

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