No. _____

In The

Supreme Court of the United States

JAMES W. TINDALL,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether this dispute is even ripe for review by the Supreme Court of the United States ("this Court") when Respondent's agency administrative record has never been filed with the U.S. Tax Court ("the Tax Court") and is not part of the judicial record, when Respondent has refused to comply with discovery, when the Tax Court has refused to compel Respondent to comply with discovery and when no effort has been made by either Respondent or the Tax Court to remedy the taint to Respondent's agency administrative record created by the known hostile conflict-of-interest that existed between Respondent's whistleblower analyst and Petitioner for more than four years?

2.) Whether the Tax Court and the Court of Appeals for the District of Columbia Circuit ("the Court of Appeals") properly ignored the clear and controlling judicial precedent identified in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), when conducting a judicial review of an administration determination and both lower courts accepted Respondent's new and contradictory administrative allegations first raised during the judicial review phase?

3.) Whether the Tax Court and the Court of Appeals applied the proper standard of review when reviewing new and contradictory administrative allegations that were only first raised during the judicial review phase with no change to the underlying facts or law?

QUESTIONS PRESENTED – Continued

4.) Whether the Tax Court and the Court of Appeals properly ignored the doctrine of *stare decisis*, which counsels the federal judiciary to follow the holdings of previously decided cases, absent special justification, when both lower courts ignored their own controlling precedents on numerous legal issues to reach legal conclusions that conflicted with their earlier decisions?

5.) Whether the standard for subject matter jurisdiction by the Tax Court to review tax whistleblower claims under 26 U.S.C. §7623(b)(4), which states that "*any determination regarding an award under paragraph (1), (2) or (3) may . . . be appealed to the Tax Court*", properly includes additional requirements created by the Court of Appeals that are not found in the broad statutory language?

PARTIES TO THE PROCEEDING

Petitioner James W. Tindall was the Petitioner in the proceeding before the Tax Court and the Appellant before the Court of Appeals.

Respondent Commissioner of Internal Revenue was the Respondent in the proceeding before the Tax Court and the Appellee before the Court of Appeals.

For clarity, the original case was sealed by the Tax Court and the original style of the case was *Whistleblower 5903-19W v. Commissioner of Internal Revenue*. On appeal, the style of the case was changed to *In re: Sealed Case*, before being updated to *James Tindall v. Commissioner of Internal Revenue* by the Court of Appeals.

RELATED CASES

1. *James Tindall v. Commissioner of Internal Revenue*, No. 23-1056, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered on October 12, 2023. Rehearing *en banc* denied on December 21, 2023.

2. *Whistleblower 5903-19W v. Commissioner of Internal Revenue*, Docket No. 5903-19W, U.S. Tax Court. Order of Dismissal entered on December 7, 2022.

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PETITION FOR A WRIT OF CERTIORARI

James W. Tindall petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported as an unpublished opinion by the Court of Appeals for the District of Columbia Circuit at USCADC Case # 23-1056 and is reproduced at App. 1-3.

The Tax Court's order dismissing Petitioner's petition for lack of subject matter jurisdiction is reproduced at App. 4-8.

The Court of Appeals' denial of Petitioner's motion for rehearing *en banc* is reproduced at App. 124.

JURISDICTION

The Court of Appeals entered judgment on October 12, 2023. App. 1-4.

The Court of Appeals denied a timely petition for rehearing *en banc* on December 21, 2023. App. 124.

Therefore, this Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case relates to 26 U.S.C. §7623(b)(4)[1], which specifically grants the Tax Court the authority to review "*any determination regarding an award under paragraph (1), (2), or (3) . . . (and the Tax Court shall have jurisdiction with respect to such matter)*."

Copies of the statutory provision are included in the Appendix.

1. 26 U.S.C. §7623. App. 125-128.

INTRODUCTION AND STATEMENT OF THE CASE

This dispute relates to the Tax Court's review of Respondent's agency determinations specific to Petitioner's eight tax whistleblower claims under §7623 in what should have been a very straightforward review of Respondent's agency administrative record after it had been cured of the taint of the unresolved hostile conflict-of-interest between Respondent's analyst and Petitioner that lasted for more than four years.[2]

The agency administrative record, however, has never been provided to the lower courts and

[1] All references to "§" or "Sec." are to Title 26 of the United States Code (also referred to as the Internal Revenue Code of 1986, as amended).

[2] App. 58-60.

is not part of the record available for review by this Court.

There are two types of claims created by §7623 and they are mutually exclusive.

For purposes of this dispute, the legal distinction between the two types of claims is driven entirely by when the individual claim was received by Respondent. If a claim was received before December 20, 2006, then it is a §7623(a) claim. If a claim was received after December 20, 2006, then it is a §7623(b) claim. Thus, the fundamental fact that determines whether a claim is a §7623(a) claim or a §7623(b) claim is the exact date that the claim was received by Respondent.

This distinction between the two types of claims is the merits issue that Petitioner raised in its petition to the Tax Court – which of Petitioner's eight claims were §7623(b) claims?

Strangely, the Tax Court was able to resolve this merits issue without Respondent's agency administrative record being before it, without allowing discovery to occur to remedy the taint to that missing agency administrative record caused by the documented conflict-of-interest while ignoring the Tax Court's own judicial precedent on these issues.

Additionally, the Tax Court previously addressed the issue of subject matter jurisdiction in this case and concluded that it had subject matter jurisdiction over

all of Petitioner's eight claims when it granted Respondent's Motion to Remand.[3]

After the remand process concluded and Respondent asserted that "*the Whistleblower Office will not be issuing supplemental determination letters at this time*"[4], the Tax Court allowed Respondent to assert new and contradictory award allegations (years after the petition was filed) that contradicted Respondent's award determination, dated March 5, 2019. The Tax Court ultimately accepted Respondent's new award assertion without Respondent ever having filed its agency administrative record with the Tax Court.

Quite simply, it is impossible for the Tax Court to review Respondent's award determination without the agency administrative record being before it. It is also impossible for the Court of Appeals to review the Tax Court's order granting dismissal without Respondent's agency administrative record being part of the record. Finally, it is impossible for this Court to review the two lower courts' orders without Respondent's agency administrative record being part of the record.

Additionally, the Tax Court's willingness to allow Respondent to assert new and contradictory award allegations during the judicial review phase that are not supported by any determination letters violates the

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[3] App. 39-42, 44-45.

[4] App. 32.

clear judicial precedent identified by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), which admonished an agency for its attempts to assert new theories on appeal that were not mentioned in its determinations and concluded that an agency's "*action be measured by what [the agency] did, not by what it might have done*" and that "*[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its actions was based*" .

As described in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), "*a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action by the grounds invoked by the agency*".

Finally, both lower courts ignored their own controlling precedent when issuing their respective orders.

The Tax Court ignored *Kasper v. Commissioner*, 150 T.C. 2 (2018)[Administrative Procedure Act ("APA") requires the Tax Court to review an agency decision against the administrative record][5]; *Klein v. Commissioner*, 45 T.C. 308 (1965)[full pleadings are required by the Tax Court, not incomplete, fragmentary or vague pleadings]; *Whistleblower One 10683-13W v. Commissioner*, 145 T.C. 8 (2015)[broad and liberal standard for discovery applies to tax whistleblower

[5] App. 29 and 40. Citing to *Wilson v. Commissioner*, 705 F.3d 980, 991 (9th Cir. 2013) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), aff'g T.C. Memo. 2010-134.

disputes][6]; *Whistleblower 972-17W v. Commissioner*, 159 T.C. 1 (2022)[standard for review when jurisdictional and merits issues are intertwined]; *Doyle v. Commissioner*, T.C. Memo. 2020-139 (2020)[Tax Court reviews a whistleblower determination by reference to the grounds it states, not by reference to post hoc rationalizations]; *Rogers v. Commissioner*, 157 T.C. 3 (2021)[conflict between IRS award determination and agency's administrative record is an abuse of discretion]; *Whistleblower 26876-15W v. Commissioner*, 147 T.C. 375 (2016)(footnote 3)[if jurisdiction turns on contested facts, allegations in the petition are generally taken as true for purposes of deciding a motion to dismiss for lack of jurisdiction]; and *Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396 (2014)[the issue is whether claimant is entitled to offer evidence to support the claims, not whether the claimant will ultimately prevail on the merits].

The Court of Appeals ignored *Byers v. Commissioner*, 740 F.3d 668, 675 (D.C. Cir. 2014)[the *de novo* standard of review applies to the Tax Court's determinations of law]; and *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022)[the jurisdictional threshold for tax whistleblower cases requires collected proceeds, facts confirmed by Respondent's award determination][7].

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[6] App. 30-31.

[7] Although Petitioner disagrees with this added jurisdictional requirement of "collected proceeds" (because it is not found in the controlling statute creating the right to an appeal), the Court of Appeals ignored its own precedent by affirming the

Background Facts

In a letter, dated sometime in February 2006, Respondent admitted that it had only received a single claim prior to that letter, assigned it claim #2950006 and further stated that "*I find no other records of 211's sent please resubmit*".[8]

Thus, contrary to the Tax Court's vague conclusion in its order, with a single exception (claim #2950006), none of Petitioner's other claims were received by Respondent before February 2006.

On March 5, 2019, Respondent issued a single award determination that specifically identified all of Petitioner's eight claims and determined that Petitioner was owed an award relating to these eight claims ("Respondent's award determination").[9]

Respondent has never issued a rejection letter or a denial letter specific to Petitioner's eight claims, nor did Respondent identify any reasons for rejection or denial in Respondent's award determination.

On March 29, 2019, Petitioner timely filed his petition with the Tax Court and identified several fundamental issues for the Tax Court to resolve:

(1) Which of Petitioner's claims are §7623(b) claims and which are §7623(a) claims;

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absence of "collected proceeds" in this case despite Respondent's award determination confirming "collected proceeds" in this case.

[8] App. 122-123.

[9] App. 117-121.

(2) What is the correct amount of collected proceeds specific to Petitioner's §7623(b) claims;

(3) What is the correct award % that should have been applied to Petitioner's §7623(b) claims; and

(4) How will the underlying tax-reporting entities' NOL tax attributes impact collected proceeds in subsequent years?

As early as December 6, 2019, in response to Petitioner's initial informal discovery requests, Respondent's counsel stated:

> "*Information outside of the information considered by the WB office, including current transcripts are not relevant.* ***It is the litigation position of counsel to not provide information outside of the claim file***."[10]

To date, Respondent's counsel has refused to comply with the liberal rule for discovery described in Tax Court Rule 70(b), and continues to assert an incorrect standard for discovery previously rejected by the Tax Court in *Whistleblower One 10683-13W v. Commissioner*, 145 T.C. 8 (2015), where the Tax Court unequivocally stated that

> "*[Respondent's] relevance objection is based solely on a generalized view that our scope of review should be limited to the "administrative record" and the information petitioners seek is outside that record.* ***Respondent's argument is <u>not</u> a sufficient basis to deny***

[10] App. 116.

> ***petitioners' discovery requests. Even were we to agree with respondent as to the scope of review, he cannot unilaterally decide what constitutes an administrative record***".[11]

At no point in time has Respondent complied with the liberal rule for discovery described in Tax Court Rule 70(b).

On May 12, 2020, Respondent filed its Motion to Remand, asking the Tax Court to exercise jurisdiction over Petitioner's eight claims and remand them for further consideration.

On May 29, 2020, in Petitioner's Response to Remand, Petitioner raised the threshold jurisdictional issue that the Tax Court must necessarily resolve before it could even consider Respondent's Motion to Remand – namely, that the identified claims subject to remand must necessarily be §7623(b) claims.[12] Specifically, Petitioner stated

> " . . . ***until the Court definitively determines which claims are §7623(b) claims (or Respondent concedes the issue and identifies each §7623(b) claim by number and reference to Petitioner's original Form 211), the Court lacks jurisdiction to even consider Respondent's Motion To Remand***."[13]

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[11] App. 29-31.

[12] App. 53-56.

[13] App. 55.

On May 29, 2020, in Petitioner's Response to Remand, Petitioner also described the unresolved hostile conflict-of-interest between Respondent's analyst and Petitioner that lasted for more than four (4) years.[14]

On February 12, 2021, Respondent identified the claims covered by its Motion to Remand as being "*2013-007993, 2015-016670, 2017-011232, 2017-011233, 2018-000759, 2018-00760, 2018-000763, and 2018-000765*".[15]

On September 22, 2021, the Tax Court granted remand specific to each of Petitioner's eight claims and specifically stated "*Section 7623(b)(4) grants the Tax Court jurisdiction to review an IRS determination regarding a whistleblower award determination*".[16]

On August 29, 2022, Respondent concluded its 11-month remand process with no change to Respondent's award determination covering all eight claims and stated "*the Whistleblower Office will not be issuing supplemental determination letters at this time*."[17]

Respondent did not issue any denial letters at that time (nor has it ever issued a denial letter specific to any of Petitioner's eight claims).

Thus, Respondent re-affirmed Respondent's award determination that all eight of Petitioner's

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[14] App. 58-60.

[15] App. 44-45.

[16] App. 40.

[17] App. 32.

claims were §7623(a) claims, that all of them were covered by Respondent's award determination, that all of them had been the subject of an administrative action and that all of them had led to collected proceeds.

On September 29, 2022, merely a month after concluding its 11-month remand process with no proposed changes to Respondent's award determination, Respondent filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction asserting new allegations that contradicted Respondent's award determination that Respondent had just re-affirmed.

For example, instead of all eight claims being §7623(a) claims, Respondent now asserted that at least one of Petitioner's claims was a §7623(b) claim. Also, instead of all eight claims leading to collected proceeds consistent with Respondent's award determination, Respondent now asserted that only two of Petitioner's claims led to collected proceeds.

Despite previously ruling in *Whistleblower One 10683-13W v. Commissioner*, 145 T.C. 8 (2015) that discovery in tax whistleblower cases is not limited to the agency administrative record, the Tax Court has refused to compel Respondent to comply with its liberal rules for discovery that the Tax Court has previously ruled does apply to tax whistleblower disputes.

At the same time, neither Respondent nor the Tax Court has attempted to remedy the taint to Respondent's missing agency administrative record created by the known hostile conflict-of-interest that existed

between Respondent's whistleblower analyst and Petitioner for more than four (4) years.

At no point in time has Respondent ever filed Respondent's agency administrative record with the Tax Court.

On December 7, 2022, the Tax Court granted Respondent's Motion to Dismiss For Lack of Subject Matter Jurisdiction ("Motion to Dismiss") without having Respondent's agency administrative record before it upon which to base that decision[18], without addressing and resolving the conflict-of-interest between Respondent's analyst and Petitioner (and its obvious taint to Respondent's agency administrative record)[19], and without any meaningful discovery having occurred[20].

In that same order, the Tax Court failed to identify which dates each of Petitioner's eight claims were received by Respondent, instead vaguely stating that "*[b]etween June 13, 2004, and November 1, 2004, petitioner filed four Forms 211*" and concluding without

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[18] App. 41, where the Tax Court specifically noted that "*Here, the administrative record concerning petitioner's whistleblower claims in this case has not yet been filed in the Court's record*", which was referenced again by the Tax Court in its order, dated March 4, 2022.

[19] App. 58-60, where the Tax Court specifically noted that "*Furthermore, it appears that the administrative record currently may be incomplete or unclear regarding certain important points*".

[20] App. 27-38.

any factual support that "*because the remaining eight claims are pre-THCA, we lack jurisdiction*".[21]

Strangely, the Tax Court was able to reach this vague factual conclusion despite Respondent's contradictory letter, dated sometime in February 2006, that stated "*I find no other records of 211's sent please re-submit*"[22], confirming the fact that only a single claim was received in 2004 – 2005.

In other words, based on the uncontested and untainted portions of the very limited record before the Tax Court, only one of Petitioner's eight claims (at most) was received by Respondent prior to February 2006.

Because the specific dates that Petitioner's claims were received by Respondent are foundational to the merits issue of Petitioner's petition before the Tax Court, the inability of the Tax Court to identify those specific dates precludes the Tax Court from resolving those contested facts in any manner other than in the non-movant's favor (consistent with the standard for resolving a Motion to Dismiss for Lack of Subject Matter Jurisdiction). Given the continuing absence of Respondent's agency administrative record from the record below, it is understandable why the Tax Court could not identify those dates with specificity.

In that same order, the Tax Court also concluded that "*because petitioner's post-THRCA claim, claim*

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[21] App. 4 and 7.

[22] App. 122-123.

number 2015-011670, provided the WBO the same information petition provided to the WBO pre-THRCA . . . we lack jurisdiction in this case"[23], despite Respondent's award determination to the contrary that Respondent re-affirmed following the remand granted by the Tax Court (i.e., if the Tax Court's conclusion was accurate, then Respondent would have issued a denial letter specific to that claim, which Respondent has never done).

In that same order, the Tax Court also concluded that "*we lack jurisdiction in this case because respondent did not commence judicial or administrative proceedings in response to the 2015-011670 claim*" [24], despite Respondent's award determination to the contrary re-affirmed by Respondent after the remand granted by the Tax Court (i.e., if the Tax Court's statement were accurate, then Respondent would have issued a denial letter specific to that claim, which Respondent has never done).

Thus, the Tax Court's order granting dismissal lacks an uncontested factual basis and is contrary to the controlling statutes and the binding judicial precedents.

The Tax Court's order also ignores the clear and controlling precedent of this Court described in *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), which admonished an agency for its attempts to assert new theories

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[23] App. 7.

[24] Id.

on appeal that were not mentioned in its determinations and concluded that an agency's "*action be measured by what [the agency] did, not by what it might have done*" and that "*[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its actions was based*".

As described in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), "*a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action by the grounds invoked by the agency*".

In this case, Respondent has only ever issued an award determination specific to Petitioner's eight claims, yet the Tax Court's order considered a completely different narrative offered by Respondent years after its agency determination was issued to Petitioner.

Finally, both lower courts ignore the doctrine of *stare decisis* by refusing to follow their own binding judicial precedents.

REASONS FOR GRANTING THE PETITION

This Court should grant review to:

(1) determine if the APA has been properly overturned by the two lower courts, based on their attempt to review an agency determination without the agency administrative record being included as part of the record;

(2) determine if the clear and controlling judicial precedent identified by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), has been properly ignored by the two lower courts when reviewing an agency determination, based on their willingness to accept new allegations that contradict Respondent's award determination, dated March 5, 2019;

(3) determine the proper standard of review to be applied when reviewing new agency allegations that were only asserted during the judicial review phase and that contradict Respondent's determination under judicial review;

(4) determine if the doctrine of *stare decisis* still applies to the federal judiciary, when it was repeatedly ignored by the two lower courts; and

(5) determine the proper standard for subject matter jurisdiction by the Tax Court when reviewing a tax whistleblower claim.

First, as a general rule, under the APA, the judicial branch reviews an agency determination based on the agency administrative record. In the absence of the agency administrative record, the judicial branch cannot even begin its review of an agency determination. Thus, it is impossible for the Tax Court to review Respondent's determination without Respondent's agency administrative record being before it. It is impossible for the Court of Appeals to review the Tax Court's order granting dismissal without Respondent's

agency administrative record being part of the lower court's record. Finally, it is impossible for this Court to review the two lower courts' orders without Respondent's agency administrative record being part of the lower courts' record.

Second, in *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), this Court admonished an agency for its attempts to assert new theories on appeal that were not mentioned in its determinations and concluded that an agency's "*action be measured by what [the agency] did, not by what it might have done*" and that "*[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its actions was based*".

As described in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), "*a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action by the grounds invoked by the agency*". In this case, Respondent has only ever issued an award determination specific to Petitioner's eight claims, yet the Tax Court considered a completely different narrative offered by Respondent years after its agency determination was issued to Petitioner and was petitioned to the Tax Court.

Quite simply, the Tax Court ignored Respondent's award determination, when it concluded that no administrative proceedings occurred and no proceeds were collected relative to six of Petitioner's claims covered by Respondent's award determination.

Respondent's award determination and the absence of a rejection denial letter specific to any of Petitioner's eight claims are fundamentally at odds with the Tax Court's conclusions, despite the requirement of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) that the Tax Court review Respondent's actions based on what Respondent did and the grounds disclosed in the record (i.e., Respondent's award determination, dated March 5, 2019). Respondent's allegations in its Motion to Dismiss (as granted by the Tax Court) are contradicted by Respondent's award determination under review, a conclusion that is precluded by the clear and controlling precedent of this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

Third, while the general standard of review to be applied when reviewing an agency determination is "*abuse of discretion*", that standard only applies to the actual agency determination as it existed at the time judicial review was requested. If Respondent changes its determination during the judicial review phase from its original determination to anything other than that determination, then Respondent has admitted that its original determination was either legally erroneous or not factually supported (why else would it have changed its original determination?). Thus, once Respondent has asserted new agency allegations during the judicial review phase that contradicts the agency determination under review, the "*abuse of discretion*" standard has been met. Therefore, the only proper standard of review remaining to be applied by a reviewing court is "*de novo*".

Fourth, as the Tax Court recently highlighted in *Murrin v. Commissioner*, T.C. Memo 2024-10 (January 24, 2024), "*the doctrine of stare decisis counsel us to "follow the holding of a previously decided case, absent special justification." Sec. State Bank v. Commissioner, 111 T.C. 210, 210 (1998), aff'd, 214 F. 3d 1254 (10th Cir. 2000)*." Despite this doctrine applying to the federal judiciary, both lower courts ignored their own judicial precedents on a number of legal issues creating a swath of unsettled issues where there were none previously.

Fifth, §7623(b)(4) defines the standard for subject matter jurisdiction by the Tax Court for reviewing a tax whistleblower dispute where it states that "*any determination regarding an award under paragraph (1), (2) or (3) may . . . be appealed to the Tax Court*". Despite this very broad statement of "*any determination*", in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), the Court of Appeals narrowed "*any determination*" to include at least one other requirement not found in that statutory provision. Strangely, even if that judicially-created additional requirement were proper, it was satisfied by Respondent's award determination in this case.

Thus, this Court should grant review to:

I. Correct the lower courts' far departures from the clear guidelines of the APA (which require the agency administrative record for judicial review);

II. Correct the lower courts' willingness to ignore the clear and controlling precedent of this Court

described in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947);

III. Determine the proper standard of review to be applied by the federal judiciary when considering new and contradictory agency allegations that contradict the agency determination under review;

IV. Correct the lower courts' willingness to ignore the doctrine of *stare decisis*; and

V. Determine the proper standard for subject matter jurisdiction by the Tax Court for tax whistleblower disputes (when there is a split among the judges on the sole Court of Appeals with appellate jurisdiction).

I. The Required Agency Administrative Record is Missing from the Record

A. Respondent's Agency Administrative Record is Required and Missing

In *Kasper v. Commissioner*, 150 T.C. 2 (2018), the Tax Court articulated "*[t]he general rule under the Administrative Procedure Act (APA) is that "review of an agency decision is limited to the administrative record*".[25] In *Klein v. Commissioner*, 45 T.C. 308, 311 (1965), the Tax Court previously stated that "*[o]ur rules require full – rather than incomplete,*

[25] Citing to *Wilson v. Commissioner*, 705 F.3d 980, 991 (9th Cir. 2013)(citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), aff'g T.C. Memo. 2010-134.

fragmentary, or vague – pleadings by the parties". Thus, the full, complete and untainted agency administrative record is a foundational requirement for any court to begin its judicial review of an agency's determination.

In the five (5) years since Petitioner first petitioned the Tax Court to review Respondent's award determination, Respondent has failed to provide its agency administrative record to the Tax Court.

Nowhere does the Tax Court docket indicate that Respondent's agency administrative record was ever filed with that court.[26]

In fact, in the Tax Court's order, dated September 22, 2021, the Tax Court states *"[h]ere, the administrative record concerning petitioner's whistleblower claims in this case has not yet been filed in the Court's record."*[27]

Moreover, Respondent was forced to attach copies of excerpts from Respondent's agency administrative record to all of its court filings, because Respondent's agency administrative record has never been filed with the Tax Court. If Respondent's agency administrative record was properly before the Tax Court, then Respondent would have merely cited to the appropriate Bates page numbers in its court filings.

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[26] App. 9-26.

[27] App. 41.

Therefore, it has been conclusively established that Respondent's agency administrative record is not part of the record upon which either of the lower courts' orders could be based, nor is it available for this Court to review.

B. Respondent's Agency Administrative Record is Tainted by the Hostile Conflict-of-Interest Between Respondent's Analyst and Petitioner

On May 29, 2020, in Petitioner's Response to Remand, Petitioner identified the unresolved conflict-of-interest by Respondent's analyst that lasted for more than four years (both in terms of the duration and the level of hostility)[28], which was acknowledged by the Tax Court[29].

At a minimum, anything in Respondent's agency administrative record that predates the 2017 reassignment of Respondent's conflicted analyst from Petitioner's claims is tainted. Respondent's conflicted analyst had years of access to and control over the relevant agency files during which time anything could have happened to those files. Moreover, any subsequent determinations by Respondent's replacement analysts that rely on the tainted pre-existing agency files are themselves equally unreliable. Thus,

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[28] App. 58-60.

[29] App. 41, where the Tax Court noted that "*Furthermore, it appears that the administrative record currently may be incomplete or unclear regarding certain important points*".

Respondent's agency administrative record is unreliable, even were it to have been filed with the Tax Court.

Therefore, it has been conclusively established that the Tax Court was previously made aware of the taint to Respondent's agency administrative record created by the 4-year hostile conflict-of-interest between Respondent's analyst and Petitioner, and that the Tax Court failed to do anything to remedy that taint, as required by its decision in *Kasper v. Commissioner*, 150 T.C. 2 (2018)(where the Tax Court describes numerous exceptions to the record rule, summarized by the Court of Appeals in *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) and *Wilson v. Commissioner*, 705 F.3d 980, 991 (9th Cir. 2013)(citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), aff'g T.C. Memo. 2010-134.

II. The Lower Courts' Orders Ignore the Controlling Precedent of this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)

A. Respondent's Only Agency Determination

On March 5, 2019, Respondent issued its only award determination specific to Petitioner's eight claims and included no statement about why an award was rejected or denied specific to any of those eight claims, because Respondent was not rejecting or denying any of Petitioner's eight claims.[30]

[30] App. 117-121.

The only agency determination ever made by Respondent determined that an award was owing specific to Petitioner's eight claims.

B. Respondent's Answer Defended Its Award Determination

In its Answer filed with the Tax Court, Respondent defended its award determination and made no mention of any new agency allegations that contradicted Respondent's award determination, dated March 5, 2019.[31]

C. Respondent's 11-Month Remand Period Resulted in No Change to Respondent's Award Determination

On August 29, 2022, in its Status Report, Respondent concluded its 11-month remand process with no change to its award determination and stated "*the Whistleblower Office will not be issuing supplemental determination letters at this time*."[32]

D. Respondent's New Allegations Contradicted Its Award Determination

On September 29, 2022, merely a month after concluding its 11-month remand process with no proposed changes to its award determination, Respondent filed

[31] Tax Court Rule 36(b) precludes Respondent from raising an affirmative defense that it did not first raise in its Answer.

[32] App. 32.

its Motion to Dismiss alleging a new and contradictory administrative determination.

First, Respondent now asserted that instead of all eight of Petitioner's claims being §7623(a) claims, at least one of Petitioner's claims was a §7623(b) claim.

Second, Respondent now asserted that instead of all eight of Petitioner's claims leading to collected proceeds, only two of Petitioner's claims led to collected proceeds.

Third, Respondent now asserted that instead of all eight of Petitioner's claims resulting in an administrative proceeding, only two of Petitioner's claims resulted in an administrative proceeding.

E. The Lower Courts Ignored the Clear and Controlling Precedent of this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)

In *SEC v. Chenery Corp*., 318 U.S. 80, 93-94 (1943), this Court previously admonished an agency for its attempts to assert new theories on appeal that were not mentioned in its determinations and concluded that an agency's "*action be measured by what [the agency] did, not by what it might have done*" and that "*[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its actions was based*".

Additionally, in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), this Court stated that "*a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action by the grounds invoked by the agency*".

In *Hewitt v. Commissioner*, No. 20-13700, 2021 U.S. App. LEXIS 38555 (11th Cir. Dec. 29, 2021), that Court recently applied this controlling judicial precedent to an appeal from the Tax Court and stated

> "*[f]urthermore,* ***"[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given,"*** *although we will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." State Farm, 463 U.S. at 43 (first quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1974), then quoting Bowman Transp. Inc. v. Ark.-Best Freight Sys., 419 U.S. 281, 286 (1974)); accord Judulang v. Holder, 565 U.S. 42, 52-55 (2011). And* ***"courts may not accept . . . counsel's post hoc rationalizations for agency actions,"*** *as* ***"an agency's action must be upheld, if at all, on the basis articulated by the agency itself."*** *State Farm, 565 U.S. at 50*."[33]

[33] *State Farm* refers to *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983).

Additionally, in *Doyle v. Commissioner*, T.C. Memo. 2020-139 (2020), the Tax Court applied this controlling judicial precedent to its review of tax whistleblower cases and stated

> "***"[t]he Tax Court reviews a WBO determination by reference to the grounds that it states, not by reference to post hoc rationalizations."*** *Lacey v. Commissioner, 153 T.C. at 165 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)); see Kasper v. Commissioner, 150 T.C. at 23-24*"

before concluding

> "*[t]herefore,* ***we look to the final determination letter and generally consider only the grounds stated therein and not other grounds advanced by the Commissioner's counsel in the litigation but not by the WBO in its determination****"*.

Thus, the lower courts are bound by Respondent's award determination, dated March 5, 2019, and are not free to entertain new allegations by Respondent that contradict Respondent's determination under review. The lower courts are bound to only consider the basis for Respondent's award determination that is specifically identified in that determination – none of which describe a rejection or denial of Petitioner's claims. Finally, the lower courts are required to base their review on the agency's administrative record, which, as described above, is absent from the record.

Therefore, Respondent's new allegations that it first raised during the judicial review phase and that contradicted Respondent's award determination are not something that the lower courts may consider, much less agree with – particularly when Respondent's agency administrative record is missing from the record.

For the lower courts to do so requires them to ignore the Chenery doctrine described by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

III. The Standard for Review – "*Abuse of Discretion*" vs. "*De Novo*"

A. "*Abuse of Discretion*" Standard of Review Applies to Agency Determinations

The general standard of review to be applied by the courts when reviewing an agency determination is "*abuse of discretion*" (i.e., legally-erroneous or contrary to the facts).

B. "*De Novo*" Standard of Review Applies to Any Subsequent Agency Allegations

The "*abuse of discretion*" standard of review applied by courts when reviewing an agency determination only applies to the actual agency determination as it existed at the time judicial review was requested.

After all, if Respondent changes its agency determination during the judicial review phase from its

original determination to anything other than that determination, then Respondent has admitted that its original determination was either legally erroneous or not factually supported (why else would it have changed its original determination?), satisfying the "*abuse of discretion*" standard.

Once Respondent asserted new agency allegations during the judicial review phase that contradicted the agency determination under review, the "*abuse of discretion*" standard has been met. Therefore, the only proper standard of review remaining to be applied by the reviewing courts is "*de novo*".

Unfortunately, despite Respondent's contradictory allegations during the judicial review phase, the Tax Court applied the "*abuse of discretion*" standard of review to the new contradictory allegations asserted by Respondent instead of the correct "*de novo*" standard.

Finally, under either standard, it is impossible for the Tax Court to accept Respondent's contradictory allegations without Respondent's agency administrative record being before the lower courts.

IV. Both Lower Courts Ignored the Doctrine of *Stare Decisis* and Their Own Binding Judicial Precedents

A. The Tax Court Ignored Its Standard for Discovery in a Tax Whistleblower Dispute

In *Whistleblower One 10683-13W v. Commissioner*, 145 T.C. 8 (2015), the Tax Court unequivocally

described the standard for discovery in tax whistleblower cases as:

> "*Rule 70 governs discovery, and paragraph (b) thereof provides that the scope of discovery is "any matter not privileged and which is relevant to the subject matter involved in the pending case." The paragraph further provides: "**It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence". The standard of relevancy in a discovery action is liberal**. See Melea Ltd. v. Commissioner, 118 T.C. 218, 221 (2002). **The information and responses petitioners seek are clearly relevant to petitioners' theory of their case**: They are looking for evidence that will prove that one or more collections of proceeds from the target were attributable to the information petitioners*."

In that case, the Tax Court also addressed and rejected Respondent's current "*litigating position*", when the Tax Court stated that

> "***Rather, [Respondent's] relevance objection is based solely on a generalized view that our scope of review should be limited to the "administrative record" and the information petitioners seek is outside that record. Respondent's argument is not a sufficient basis to deny petitioners' discovery requests. Even were we to agree with respondent as to the scope***

> ***of review, he cannot unilaterally decide what constitutes an administrative record.*** *See Thompson v. DOL, 885 F.2d 551, 555 (9th Cir. 1989); Tenneco Oil Co. v. DOE, 475 F. Supp. 299, 317 (D. Del. 1979). How could evidence related to whether there was a collection of proceeds and whether that collection was attributable to the whistleblower's information not be part of any purported administrative record? Any such evidence goes to the very basic factual inquiries required by section 7623(b).* ***Respondent's lack of direct response to petitioners' motions appears to indicate that the current "administrative record" is incomplete.*** *See Tenneco Oil Co. v. DOE, 475 F. Supp. at 317-318 (allowing discovery to complete the administrative record); see also Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) ("The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters")."*

Thus, the Tax Court has clearly rejected Respondent's desired standard for discovery in tax whistleblower cases and the Tax Court has confirmed that the standard for discovery in tax whistleblower cases is the same as in all other cases – **the liberal standard of being relevant to the subject matter without regard for admissibility.**

Despite this clear statement of the standard for discovery in tax whistleblower disputes, in this dispute, the Tax Court refused to follow its own judicial

precedents by denying Petitioner's two Motions to Compel Discovery[34], necessitated by Respondent's "*litigating position*" that was previously rejected by the Tax Court. The Tax Court's refusal to follow its own binding precedent is inexplicable.

B. The Tax Court Ignored Its Precedent that It has Jurisdiction Where the Jurisdictional and Merits Issues are Intertwined

In *Whistleblower 972-17W v. Commissioner*, 159 T.C. No. 1, 7 (2022), the Tax Court previously addressed this issue and stated that

> "*[w]hile we generally review whistleblower determinations for abuse of discretion based on the administrative record, . . . courts in other contexts have employed different standards* ***when jurisdictional and merits issues are so intertwined***".

In that case where the jurisdictional and merits issues were so "*intertwined*", the Tax Court concluded that it did have jurisdiction.

Petitioner filed his petition with the Tax Court asking it to determine which of his eight claims were §7623(b) claims and subject to review by the Tax Court. This is the merits issue raised by Petitioner.

Respondent asserted in its Motion to Dismiss that none of Petitioner's eight claims were eligible for an

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[34] App. 27-38.

award under §7623(b), despite admitting in that same motion that at least one of Petitioner's claims subject to Respondent's award determination was indeed a §7623(b) claim. This is the jurisdictional issue previously resolved by the Tax Court in Petitioner's favor.

Thus, the merits issue and the jurisdictional issue are exactly the same – they could not be more intertwined. Despite the Tax Court's own judicial precedent holding that the intertwining of the merits and jurisdictional issues means that the Tax Court does have jurisdiction, the Tax Court refused to follow its own judicial precedents and held that it did not have jurisdiction. The Tax Court's refusal to follow its own binding precedent is inexplicable.

C. The Tax Court Ignored Its Prior Determination that It had Jurisdiction in This Case

In *Luu v. Commissioner*, T.C. Memo 2022-126, the Tax Court specifically stated

> "*Remand to the WBO for further administrative proceedings* ***may be appropriate in certain whistleblower cases under section 7623(b).*** *See Whistleblower 769-16W v. Commissioner, 152 T.C. 172 (2019).*"

On May 12, 2020, Respondent filed its Motion to Remand, asking the Tax Court to exercise jurisdiction over Petitioner's eight claims and remand them for further consideration.

On February 12, 2021, in response to the Tax Court's order, dated February 10, 2021[35], Respondent identified the claims covered by its Motion to Remand as being "*2013-007993, 2015-016670, 2017-011232, 2017-011233, 2018-000759, 2018-00760, 2018-000763, and 2018-000765*".[36]

On September 22, 2021, the Tax Court granted Respondent's Motion to Remand specific to Petitioner's eight identified claims, exercised jurisdiction over all eight of Petitioner's claims and specifically stated "*Section 7623(b)(4) grants the Tax Court jurisdiction to review an IRS determination regarding a whistleblower award determination*".[37]

Although the Tax Court always has jurisdiction to decide whether it has jurisdiction[38], the Tax Court is a court of limited jurisdiction, and only has jurisdiction to review whistleblower determinations under §7623(b).[39]

In this case, Respondent admitted that all eight claims identified in its Motion to Remand are necessarily §7623(b) claims, because the Tax Court lacks jurisdiction to do anything specific to §7623(a) claims except dismiss them. In asking the Tax Court to assert and exercise jurisdiction over all of Petitioner's eight

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[35] App. 47-48.

[36] App. 44-46.

[37] App. 39-42.

[38] *McCrory v. Commissioner*, 156 T.C. 90, 93 (2021).

[39] §7623(b)(4).

claims and remand them for further consideration, Respondent necessarily admitted that all eight claims are §7623(b) claims. **Thus, Respondent, by the necessary jurisdictional statement of its Motion to Remand, has already admitted under penalties of perjury that all of Petitioner's eight claims are §7623(b) claims. Therefore, the issue of jurisdiction was decided in Petitioner's favor in 2021.**

Despite the clear judicial precedents confirming that the Tax Court only has jurisdiction over §7623(b) claims and the previous exercise of jurisdiction over all eight of Petitioner's claims in this dispute by the Tax Court, the Tax Court suddenly reached a contrary conclusion without any new facts being before it. The Tax Court's refusal to follow its own binding precedent is inexplicable.

D. The Tax Court Ignored Its Precedent that the Absence of a Coherent Account of Respondent's Determination is an "*Abuse of Discretion*"

In *Rogers v. Commissioner*, 157 T.C. No. 3 (2021), the Tax Court confirmed that a conflict between the agency's administrative record and Respondent's award determination is an "*abuse of discretion*", where it stated

> "*As the Supreme Court recently observed: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners*

> *when it deals with them."* Niz-Chavez v. Garland, *593 U.S. ___, ___, 141 S. Ct. 1474, 1486 (2021).* ***We cannot countenance intentional obfuscation on the part of the WBO. And neither the WBO Letter alone nor the Letter coupled with the administrative record here provides a coherent account of the WBO's determination that is consistent with the regulations. That, in turn, represents an abuse of discretion, and accordingly we must deny the Commissioner's motion***."

In that case, Respondent attempted to defend its inability to comply with its own regulations, where it issued a rejection letter, but identified reasons specific to a denial letter to support that rejection letter. Because the reasons articulated in the issued letter were inconsistent with the type of letter issued, the Tax Court concluded that there was an "*abuse of discretion*" by Respondent.

Similarly, in this case, Respondent's award determination was specific to all of Petitioner's eight claims and provided no rational supporting a rejection or a denial by Respondent.

Respondent's new theory that only two claims led to collected proceeds contradicts Respondent's award determination that determined that all eight claims led to collected proceeds.

Respondent's new theory that at least one claim is a §7623(b) claim contradicts Respondent's award

determination that determined that all eight claims were §7623(a) claims.

Thus, Respondent's new theory first raised in its Motion to Dismiss contradicts Respondent's award determination and Respondent's statements at the end of the remand process that no new determination letters would be issued (i.e., reaffirming Respondent's award determination, dated March 5, 2019, specific to Petitioner's eight claims).

For Respondent to assert that the administrative record supports something other than Respondent's award determination and to contradict the reasons identified in Respondent's award determination constitutes a clear abuse of discretion.

At the same time, the lower courts' willingness to accept new and contradictory allegations by Respondent without Respondent's agency administrative record before them upon which to base their reviews is an abuse of discretion.

As such, despite its' own controlling judicial precedents requiring it to ignore Respondent's new allegations contradicted by Respondent's award determination, the Tax Court ignored its own judicial precedent, accepted Respondent's contradictory allegations and somehow determined that one set of Respondent's contradictory allegations was correct without Respondent's agency administrative record before it. The Tax Court's refusal to follow its own binding precedent is inexplicable.

E. The Tax Court Incorrectly Resolved Contested Facts in the Moving Party's Favor When Considering Respondent's Motion to Dismiss

In *Whistleblower 26876-15W v. Commissioner*, 147 T.C. 375 (2016)(footnote 3), the Tax Court articulated its standard to be applied when deciding a motion to dismiss where it stated,

> "*[w]hen deciding a motion to dismiss for lack of jurisdiction,* ***we construe the undisputed allegations of the petition in a manner favoring a finding of jurisdiction***. *See*, *e.g.*, Whistleblower 11332-13W v. Commissioner, *142 T.C. 396, 400 (2014).* ***If jurisdiction turns on contested facts, allegations in the petition are generally taken as true for purposes of deciding a motion to dismiss for lack of jurisdiction***."

In *Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396 (2014), the Tax Court expanded on this standard where it stated,

> "***Where jurisdiction turns on contested facts, allegations in the petition are generally taken as true for purposes of deciding a motion to dismiss for lack of jurisdiction***. *See*, *e.g.*, O'Brien v. Commissioner, *40 B.T.A. 280 (1939).* ***The issue is whether the claimant is entitled to offer evidence to support the claims, not whether the claimant will ultimately prevail on the merits***. *See* Scheuer v. Rhodes, *416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d*

90 (1974); see also Reynolds v. Army and Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988)."

Therefore, when ruling on a motion to dismiss for lack of subject matter jurisdiction, the Tax Court is obligated to accept statements in the petition as true, to resolve factual disputes in favor of the non-moving party, (i.e., Petitioner, in this case) and to allow Petitioner the opportunity to present evidence (which necessarily requires discovery).

Petitioner clearly identified Respondent's letter, dated before February 2006, in his petition, and Respondent's hand-written statement that only a single claim had been received before February 2006.[40]

Despite this documented contemporaneous party admission by Respondent confirming that no more than a single claim was received before February 16, 2006, the Tax Court stated as fact that Petitioner filed four (4) Forms 211 between June 13, 2004 and November 1, 2004.

Such a stark conflict between these two factual assertions about when each claim was received by Respondent requires the Tax Court to resolve those contested facts in Petitioner's favor for purposes of deciding a motion to dismiss for lack of jurisdiction.

Additionally, Respondent's own contradictory statements about Petitioner's claims (i.e., the claim type, the occurrence of administrative proceedings and

[40] App. 122-123.

possible collected proceeds specific to each claim) requires the Tax Court to resolve these contested facts in Petitioner's favor for purposes of deciding a motion to dismiss for lack of jurisdiction.

Despite the Tax Court's clear judicial precedent that requires it to resolve these disputed facts in Petitioner's favor, the Tax Court ignored Respondent's contemporaneous party admission and contradictory allegations about Petitioner's eight claims as part of its order denying jurisdiction. The Tax Court's refusal to follow its own binding precedent is inexplicable.

F. The Court of Appeals Ignored Its Precedent Determining the Jurisdictional Standard for Tax Whistleblower Disputes

In *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), the Court of Appeals previously identified the jurisdictional threshold for reviewing tax whistleblower cases as arising

> "*only when the IRS "**proceeds with any administrative or judicial action** described in subsection (a) based on information brought to the Secretary's attention by [the whistleblower]. . . ." 26 U.S.C. §7623(b)(1) (**emphasis** added). A threshold rejection of a Form 211 by nature means the IRS is not **proceeding** with an action against the target taxpayer. See Cline v. Comm'r, 119 T.C.M. (CCH) 1199, 2020 WL 1249454, at *5 (T.C. 2020). Therefore, there*

> *is no award determination, negative or otherwise, and no jurisdiction for the Tax Court*."

In the current dispute, Respondent has only ever issued a single award determination specific to Petitioner's eight claims. Respondent's award determination confirms that an administrative proceeding occurred and that proceeds were collected with respect to each of Petitioner's eight claims. Were that not the case, then Respondent would have issued a denial letter, which it did not do.

Despite the clear judicial precedent by the Court of Appeals requiring an administrative proceeding to occur before a tax whistleblower determination is reviewable by the Tax Court and the undeniable fact that Respondent only ever issued an award determination confirming the occurrence of an administrative proceeding specific to all of Petitioner's eight claims, the Court of Appeals suddenly decided that an award determination letter confirming the occurrence of an administrative proceeding and collected proceeds is insufficient for subject matter jurisdiction – effectively creating a split within the sole Court of Appeals with authority to review this issue. The Court of Appeals' refusal to follow its own binding precedent is inexplicable.

G. The Court of Appeals Ignored Its "*De Novo*" Standard for Reviewing Legal Issues

All twelve of the issues presented by Petitioner to the Court of Appeals were questions of law.

Despite the obvious "*de novo*" standard for reviewing questions of law described by the Court of Appeals in *Byers v. Commissioner*, 740 F.3d 668, 675 (D.C. Cir. 2014), the Court of Appeals applied a "*did not clearly err*" standard for review[41] when reviewing the Tax Court's order granting dismissal and failed to address any of the questions of law raised by Petitioner in its brief. The Court of Appeals' refusal to follow its own binding precedent on the proper standard of review is inexplicable.

V. Tax Court's Statutory Standard for Subject Matter Jurisdiction

A. 26 U.S.C. §7623(b)(4) – "*Any Determination*"

§7623(b)(4) states that "*any determination regarding an award under paragraph (1), (2) or (3) may . . . be appealed to the Tax Court*".

"*Any determination regarding an award*" contains no limitations and makes no mention of a requirement for an administrative proceeding or collected proceeds.

"*Any determination*" clearly includes the subset of determinations that are rejections and denials. Rejections and denials are award determinations that no award is owing.

If Congress had otherwise intended to limit reviewable award determinations to only those award

[41] App. 1.

determinations where Respondent admitted that administrative proceedings had occurred or where Respondent admitted that proceeds were collected, then Congress could have easily added that limiting language. Congress did not do so, but instead choose to allow the Tax Court to have subject matter jurisdiction over "*any determination regarding an award*".

In this dispute, Petitioner received Respondent's award determination, which specifically identified all eight of Petitioner's claims as being the basis for an award. To the extent any of those eight claims are §7623(b) claims, then Petitioner has the statutory right to seek judicial review of "*any determination regarding"* those §7623(b) awards.

B. The Court of Appeals Incorrectly Added At Least One Additional Requirement to the Broad Statutory Standard

In *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), the Court of Appeals previously identified the jurisdictional threshold for reviewing tax whistleblower cases as arising

> "*only when the IRS "**proceeds with any administrative or judicial action** described in subsection (a) based on information brought to the Secretary's attention by [the whistleblower]. . . ."*

In *Kennedy v. Commissioner*, No. 21-1133 (pending oral argument), the Court of Appeals is considering

if the jurisdictional threshold for reviewing tax whistleblower cases also includes "*collected proceeds*".

The fundamental problem with these two additional requirements is that tax whistleblowers cannot access the agency's administrative record to determine the occurrence of an administrative proceeding or the existence of collected proceeds until after jurisdiction has been determined – and tax whistleblowers cannot support their claim of jurisdiction without the agency administrative record. This is a classic case of "*which comes first – the chicken or the egg?*"

Congress was addressing Respondent's incompetence when it expanded the Tax Court's review authority to include tax whistleblower claims[42], "*any determination of an award*" means exactly that – "*any determination of an award*".

CONCLUSION – RELIEF SOUGHT

For the reasons set forth above, the Court of Appeals' order, dated October 12, 2023, affirming the Tax Court's order granting dismissal, dated December 7, 2022, contradicts the clear language of the APA, ignores the clear and controlling precedent of this Court for reviewing agency determinations, applies improper standards of review, ignores the lower courts' own binding judicial precedents and improperly narrows

[42] See *Luu v. Commissioner*, T.C. Memo 2022-126 (footnote 10).

the broad definition of "*any determination*" for subject matter jurisdiction by the Tax Court.

As such, this Court should grant this petition for a writ of certiorari to allow this Court to confirm the federal judiciary's ability to review an agency determination without the agency administrative record being before it, to review the lower courts' refusal to follow the clear and controlling judicial precedent identified in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), to determine the proper standards of review, to confirm the lower courts' refusal to follow the doctrine of *stare decisis* and to determine the if standard for subject matter jurisdiction by the Tax Court for tax whistleblower cases includes requirements not found in the broad statutory language of "*any determination of an award*".

Alternatively, this Court should vacate the orders by the lower courts and remand this case back to the Tax Court with instructions that the Tax Court reconsider this dispute only after having Respondent's agency administrative record properly before it (and properly cured from the conflict-of-interest taint), that the Tax Court properly apply the controlling judicial precedents of this Court and that the Tax Court properly apply its previous judicial precedents, consistent with the still applicable doctrine of *stare decisis*.

Respectfully submitted this the 18th day of March, 2024.

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United States Court of Appeals
For The District of Columbia Circuit

No. 23-1056 **September Term, 2023**

USTC-5903-19W

Filed On: October 12, 2023

In re: Sealed Case,

ON APPEAL FROM THE
UNITED STATES TAX COURT

BEFORE: Wilkins, Katsas, and Walker, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States Tax Court and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2), D.C. Cir. Rule 34(j). Upon consideration of the foregoing. and appellant's motion to unseal and the supplement thereto, it is

ORDERED AND ADJUDGED that the Tax Court's December 7, 2022 order dismissing for lack of jurisdiction appellant's petition for review of a March 5, 2019 whistleblower determination be affirmed. The Tax Court did not clearly err by concluding that the information for which appellant sought a whistle-blower award was provided to the Internal Revenue Service before December 20, 2006. See Feldman v. Fed. Deposit Ins. Co., 879 F.3d 347, 351 (D.C. Cir. 2018)

(requiring district courts to resolve disputes over the factual basis for the court's subject-matter jurisdiction); U.S. Auto Sales, Inc. v. Comm'r of Internal Revenue, 153 T.C. 94, 100 & n.7 (2019) (applying this standard in Tax Court). Consequently, the Tax Court correctly concluded that it lacked jurisdiction. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109432, § 406(d), 120 Stat. 2922, 2960; see also Lissack v. Comm'r of Internal Revenue, 68 F.4th 1312, 1315 (D.C. Cir. 2023). It is

FURTHER ORDERED, on the court's own motion, that appellee show cause within 30 days of the date of this judgment why the sealed portions of the record of this case should not be unsealed. Cf. D.C. Cir. Rule 47.1(f)(1). With respect to material which must remain under seal pursuant to statute or rule, see, e.g., 26 U.S.C. § 6103(a) (providing that tax returns and return information are confidential), appellee may discharge his obligation by identifying the applicable provision and the sealed material to which the provision applies. For any other sealed portion of the record that appellee believes should not be unsealed, he should specifically identify the sealed material and provide a specific explanation for why the material should remain sealed. The response to the order to show cause may not exceed the length limitations established by Federal Rule of Appellate Procedure 27(d)(2) (5,200 words if produced using a computer; 20 pages if handwritten or typewritten). Appellant may file a reply, not to exceed 2,600 words, or 10 pages if

handwritten or typewritten, within 14 days of the filing of appellee's response.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

[SEAL] **United States Tax Court**
Washington, DC 20217

WHISTLEBLOWER 5903-19W,	:	
Petitioner(s)	:	
v.	:	Docket No. 5903-19W
COMMISSIONER OF INTERNAL REVENUE,	:	
Respondent	:	

ORDER OF DISMISSAL

(Filed Dec. 7, 2022)

This case involves a petition for review of a March 5, 2019 whistleblower determination pursuant to Internal Revenue Code section 7623.

Pending before the Court are respondent's Motion to Dismiss for Lack of Jurisdiction, to which petitioner objects, filed September 29, 2022 and petitioner's Motion for Partial Summary Judgment, filed October 4, 2022, to which respondent has not filed a response.

For the reasons set forth below, respondent's Motion to Dismiss for Lack of Jurisdiction is granted.

Background

Between June 13, 2004 and November 1, 2004, petitioner filed four Forms 211 to which the WBO assigned master claim number 2013-007993 and related claim numbers 2017-011232, 2017-011233, 2018-000744,

2018-000759, 2018-000760, 2018000763, and 2018-000765 (collectively, the "Pre-TRHCA Enactment Claims" or "section 7623(a) claims"). Later, on or after July 23, 2015, petitioner filed two additional Forms 211, for an unrelated federal consolidated return-filing taxpayer, to which the WBO assigned claim number 2015-016670 and which the WBO associated with master claim number 2013-007993 (the "Post-TRHCA Enactment Claim" or "section 7623(b) claims").

On March 5, 2019, the Whistleblower Office (WBO) issued a letter to petitioner stating that petitioner was entitled to a discretionary award pursuant to section 7623(a). The claim numbers listed on the award letter are master claim number 2013007993 and related claim numbers, 2017-011232, 2017-011233, 2018-000744, 2018000759, 2018-000760, 2018-000763, 2018-000765, 2015-011670. Although there are nine claim numbers listed in this letter, the records attached to respondent's Motion to Dismiss for Lack of Jurisdiction, filed September 29, 2022, show that the award offered in the March 5, 2019 award letter pertained to only two of the nine claim numbers.

After examination, respondent found that of the taxpayers related to petitioner's various claims, the taxpayers underlying claim numbers 2017-011232 and 2017-011232 were the only taxable parties. Therefore, respondent recovered proceeds from only these two claims, which are section 7623(a) claims.

The records further show that regarding claim number 2015-011670, the only section 7623(b) claim in

this case, respondent did not take administrative or judicial action and did not collect any proceeds because the statute of limitations to examine the taxpayer underlying the 2015-011670 for the years in questions had expired. Moreover, petitioner did not provide the WBO with any new information when he submitted the Forms 211 for the 2015-011670 claim. In support of his 2015 Forms 211, petitioner provided the same letters he provided to the WBO in 2004.

Discussion

The Secretary has long had the discretion to pay awards to persons who provide information that aids in (1) detecting underpayments of tax or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws. Sec. 7623(a). Congress enacted the Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. No. 109-432, div. A, sec. 406, 120 Stat. at 2958, to address perceived problems with the discretionary award regime. *See Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396, 400 (2014). TRHCA section 406 amended section 7623 to require the Secretary to pay whistleblower awards under certain circumstances. TRHCA sec. 406(a)(1)(D), 120 Stat. at 2959 (adding to section 7623(b)). Under section 7623(b)(1) a whistleblower is entitled to a minimum award of 15% of the collected proceeds if the Commissioner proceeds with administrative or judicial action using information provided in a whistleblower claim. Whistle blower claims filed after TRHCA are subject to this Court's review. However, when a whistleblower submits a post-TRHCA

claim using the same information the whistleblower provided to the WBO pre-THRCA, this Court lacks jurisdiction. *See Whistleblower* 19860-15W v. *Commissioner*, T.C. Memo 2017-112; *see also*, *Wolf v. Commissioner*, T.C. Memo. 2007-133 (2007); *Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396 (2014).

Additionally, in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. Jan. 11, 2022), the Court of Appeals for the District of Columbia Circuit held that the Tax Court lacks jurisdiction of whistleblower cases involving threshold rejections of claims for whistleblower award where no judicial or administrative proceeding was commenced based on the whistleblower's information. That ruling is now final.

We find that because petitioner's post-THRCA claim, claim number 2015011670, provided the WBO the same information petitioner provided to the WBO pre-THRCA and because the remaining eight claims are pre-THCA, we lack jurisdiction in this case. We further find that we lack jurisdiction in this case because respondent did not commence judicial or administrative proceedings in response to the 2015011670 claim.

Upon due consideration of the foregoing, it is

ORDERED that the respondent's September 29, 2022, Motion to Dismiss for Lack of Jurisdiction is granted. It is further

ORDERED that all pending motions in this case are denied as moot.

(Signed) Eunkyong Choi
Special Trial Judge

This case is sealed

Docket Number 5903-19W [ ] File a Document

WHISTLEBLOWER 5903-19W, Petitioner v. Commissioner of Internal Revenue, Respondent

Docket Record

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Filed Date	Filings and Proceedings	Action	Served
04/01/19	PETITION FILED by Petr. WHISTLEBLOWER 5903-19W: FEE PAID (ATTACHMENTS) (UNREDACTED)	ORD 02/25/2020	04/10/19
04/01/19	REQUEST FOR PLACE OF TRIAL AT ATLANTA, GA by Petr. WHISTLE-BLOWER 5903-19W (UNREDACTED)	ORD 02/25/2020	04/10/19
04/01/19	MOTION TO PROCEED ANONYMOUSLY by Petr. WHISTLE-BLOWER 5903-19W (UNREDACTED)	ORD 02/25/2020	04/10/19
04/09/19	ORDER PETR.BY 4-30-19 FILE A RESPONSE TO THIS ORDER AS STATED HEREIN. THE ENTIRE RECORD	ORD 02/25/2020	04/10/19

	IN THIS CASE IS TEMPORARILY SEALED PENDING RESOLUTION OF PETR'S MOTION TO PROCEED ANONYMOUSLY. (UNREDACTED)		
04/09/19			04/10/20
04/24/19	RESPONSE TO ORDER DATED 04/09/2019 (SEALED) by Petr. WHISTLEBLOWER 5903-19W (UNREDACTED)	ORD 02/25/2020	04/25/19
04/25/19	ORDER PETRS 4-24-19 RESPONSE TO ORDER DATED 4-9-19 IS SEALED. (UNREDACTED)	ORD 02/25/2020	04/26/19
04/25/19			04/26/19
06/06/19	ANSWER by Resp. (C/S 06/05/19)(UNREDACTED)	ORD 02/25/2020	
07/24/19	MOTION FOR PROTECTIVE ORDER PURSUANT TO RULE 103 by Resp. & Petr. WHISTLEBLOWER 5903-19W (NO OBJECTION) (UNREDACTED)	ORD 09/03/2019	

09/03/19	ORDER THAT JOINT MOTION FOR PROTECTIVE ORDER PURSUANT TO RULE 103 IS GRANTED. (UNREDACTED)	ORD 02/25/2020	09/05/19
09/03/19			09/05/19
12/17/19	ORDER RESP BY 1-7-20 FILE AN OBJECTION TO PETRS MOTION TO PROCEED ANONYMOUSLY. (UNREDACTED)	ORD 02/25/2020	12/19/19
12/17/19			12/19/19
12/27/19	MOTION TO DEEM RESPONDENT'S INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT by Petr. WHISTLEBLOWER 5903-19W (C/S 12/23/19) (EXHIBITS) (UNREDACTED)	ORD 04/17/2020	
01/06/20	RESPONSE TO MOTION TO PROCEED ANONYMOUSLY by Resp. (C/S 01/03/20) (UNREDACTED)	ORD 02/25/2020	
01/06/20	MOTION FOR PARTIAL SUMMARY JUDGMENT by Petr.	MNA 07/10/2020	

	WHISTLEBLOWER 5903-19W (C/S 01/03/20) (EXHIBITS) (UNREDACTED) (SEALED)		
01/07/20	FIRST SUPPLEMENT TO MOTION FOR PARTIAL SUMMARY JUDGMENT by Petr. WHISTLEBLOWER 5903-19W (C/S 01/04/20) (EXHIBITS) (UNREDACTED)(SEALED)	MNA 07/10/2020	
Filed Date	**Filings and Proceedings**	**Action**	**Served**
01/14/20	ORDER RESP BY 2-26-20 FILE SEPARATE RESPONSES TO PETRS MOTION TO DEEM RESPS INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT AS SUPPLEMENTED. PETRS 1-7-20 MOTION FOR PARTIAL SUMMARY JUDGMENT IS RECHARACTERIZED AS A FIRST SUPPLEMENT TO MOTION FOR	ORD 02/25/2020	01/16/20

	PARTIAL SUMMARY JUDGMENT. (UNREDACTED)		
01/14/20			01/16/20
~~02/10/20~~	~~FIRST FORMAL DISCOVERY REQUEST FOR DOCUMENTS, PARTY ADMISSIONS BY RESPONDENT AND INTERROGATORIES by Petr. WHISTLEBLOWER 5903-19W (UNREDACTED)~~ (STRICKEN)	ORD 02/19/2020	02/13/20
02/11/20	ORDER THAT CASE IS ASSIGNED TO S.T. JUDGE CARLUZZO (UNREDACTED)	ORD 02/25/2020	02/12/20
02/11/20		GD 02/21/2020	02/21/20
02/19/20	ORDER THAT PETITIONER'S FIRST FORMAL DISCOVERY REQUEST FOR DOCUMENTS, PARTY ADMISSIONS BY RESPONDENT AND INTERROGATORIES, FILED 2/10/20, IS HEREBY STRICKEN FROM THE COURT'S RECORD IN THIS CASE. (UNREDACTED)	ORD 02/25/2020	02/20/20

02/19/20			02/25/20
02/25/20	ORDER PARTIES BY 3/30/20 SHALL FILE A JOINT REPORT. PETITIONER BY 4/13/20 SHALL FILE OR LODGE, AS APPROPRIATE, AS SEPARATE DOCKET ENTRIES, REDACTED VERSIONS (WITH REDACTIONS MADE IN ACCORDANCE WITH THE INSTRUCTIONS) OF THE UNREDACTED DOCUMENTS BY PETITIONER THE PETITION, PETITIONER'S REQUEST FOR PLACE OF TRIAL FILED 4/1/19, PETITIONER'S MOTION FILED 4/1/19, PETITIONER'S MOTION TO DEEM RESPONDENT'S INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT FILED 12/27/19, PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED 1/6/20 AND PETITIONER'S FIRST SUPPLEMENT TO MOTION FOR PARTIAL SUMARY	GD 02/25/2020	02/25/20

JUDGMENT FILED
1/7/20. RESPONDENT BY
4/13/20 SHALL FILE, OR
LODGE AS APPROPRI-
ATE, AS SEPARATE
DOCKET ENTRIES, RE-
DACTED VERSIONS OF
THE ANSWER FILED
1/6/19, AND RESPOND-
ENT'S RESPONSE TO
MOTION TO PROCEED
ANONYMOUSLY FILED
ON 1/6/20. PARTIES BY
4/13/20 SHALL FILE A
JOINTLY REDACTED
VERSION OF THEIR
JOINT MOTION FOR
PROTECTIVE ORDER
PURSUANT TO RULE
103 FILED ON 7/24/19,
ALONG WITH A SIGNED
STIPULATION AS
STATED HEREIN. PAR-
TIES BY 4/13/20 SHALL
JOINTLY FILE A
SIGNED STIPULATION
AS TO THE ORDERS
DATED 4/9/19, 4/25/19,
9/3/19, 12/17/19, 1/14/20,
2/11/20, 2/19/20 AND THIS
ORDER DATED 2/25/20
AS STATED HEREIN.
PARTIES SHALL NOTE
THE REMINDERS AND
FOLLOW THE

	INSTRUCTION AS STATED HEREIN. PETITIONER'S MOTION TO PROCEED ANONYMOUSLY IS GRANTED. THE CAPTION OF THIS CASE IS AMENDED AND PETITIONER'S ADDRESS IS SEALED. THE TEMPORARY SEAL IN THIS CASE IS LIFTED. THE CLERK SHALL SEAL AND REMOVE FROM THE COURT'S PUBLIC RECORD ALL DOCUMENTS LODGED, FILED OR SUBMITTED AND NOT PREVIOUSLY SEALED BY COURT ORDERS AND ALL COURT ORDERS, INCLUDING THIS ORDER.		
02/25/20			02/25/20
02/25/20	RESPONSE TO MOTION TO DEEM RESPONDENT'S INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT by Resp. (C/S02/24/20) (UNREDACTED)	ORD 02/27/2020	
02/25/20	RESPONSE TO MOTION FOR PARTIAL	ORD 02/27/2020	

	SUMMARY JUDGMENT, AS SUPPLEMENTED by Resp. (C/S02/24/20) (EXHIBITS) (UNREDACTED)		
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03/02/20	SECOND SUPPLEMENT TO MOTION FOR PARTIAL SUMMARY JUDGMENT by Petr. WHISTLEBLOWER 5903-19W (C/S 02/28/20) (UNREDACTED)	ORD 03/02/2020	

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03/02/20		ORD 9/22/21	
03/04/20	REPLY TO RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT, AS SUPPLEMENTED by Petr. WHISTLEBLOWER 5903-19W (C/S 03/02/20) (UNREDACTED)		
03/04/20			
03/04/20	REPLY TO RESPONSE TO MOTION TO DEEM RESPONDENT'S INSUFFICIENT DENIALS IN		

	ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT by Petr. WHISTLEBLOWER 5903-19W (C/S 03/02/20) (UNREDACTED)		
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03/09/20	FIRST SUPPLEMENT TO REPLY TO RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT, AS SUPPLEMENTED by Petr. WHISTLEBLOWER 5903-19W (C/S03/06/20) (EXHIBITS) (UNREDACTED)		
03/09/20			
03/16/20	Third Supplement to Motion for Partial Summary Judgment	ORD 7/22/21	
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Filed Date	**Filings and Proceedings**	**Action**	**Served**
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~~07/10/20~~	~~RESPONSE TO MOTION TO REMAND by Petr. WHISTLEBLOWER 5903-19W (C/S 05/29/20) (EXHIBITS) (POST MARKED TIMELY)~~ (STRICKEN)	ORD 07/31/2020	
07/10/20	STATUS REPORT by Resp. & Petr. WHISTLE-BLOWER 5903-19W (UNREDACTED) (SEALED)		

07/10/20	STIPULATION by Resp. & Petr. WHISTLEBLOWER 5903-19W (UNREDACTED) (SEALED)		
07/10/20	STIPULATION by Resp. & Petr. WHISTLEBLOWER 5903-19W (SEALED)		
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07/10/20	REQUEST FOR ADMISSIONS by Petr. WHISTLEBLOWER 5903-19W (C/S 03/27/20) (UNREDACTED) (SEALED)	ORD 08/28/2020	
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07/10/20		ORD 02/25/2020 ORD 08/28/2020	04/10/19
~~07/10/20~~	~~MOTION TO DEEM RESPONDENTS INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT by Petr. WHISTLEBLOWER~~	ORD 04/17/2020 ORD 08/28/2020	

	~~5903-19W (C/S 12/23/19) (EXHIBITS) (UNREDACTED) (SEALED)~~ (STRICKEN)	
07/10/20	MOTION TO DEEM RESPONDENT'S INSUFFICIENT DENIALS IN ITS ANSWER AS PARTY ADMISSIONS BY RESPONDENT by Petr. WHISTLEBLOWER 5903-19W (C/S 12/23/19) (ATTACHMENTS) (REDACTED) (SEALED)	ORD 04/17/2020
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07/10/20	REPLY TO RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT AS SUPPLMENTED by Petr. WHISTLEBLOWER 5903-19W (C/S03/02/20) (UNREDACTED) (SEALED)	ORD 08/28/2020

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~~06/15/22~~	~~Motion for Protective Order Pursuant to Rule 103 (Objection)~~ (STRICKEN)	ORD 6/22/22	06/15/22
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Filed Date	**Filings and Proceedings**	**Action**	**Served**
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09/29/22		ord 12-7-22	09/29/22
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10/04/22		ord 12-7-22	10/04/22
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10/13/22			10/19/22

10/28/22			10/28/22
10/29/22			10/29/22
11/04/22		ord 12-7-22	11/04/22
11/05/22		ord 12-7-22	11/05/22
11/07/22			11/10/22

Filed Date	**Filings and Proceedings**	**Action**	**Served**
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12/02/22			12/02/22
12/05/22			12/08/22
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12/07/22			12/07/22
12/07/22			12/07/22
02/26/23			02/26/23
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03/01/23			03/08/23
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06/30/23 06/30/23

01/02/24

UNITED STATES TAX COURT

REDACTED

WHISTLEBLOWER 5903-19W, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent	DOCKET NO. 5903-19W Filed Electronically (Redacted) and Under Seal (Unredacted)

PETITIONER'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED MAY 18, 2022, DENYING PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PETITIONER'S FORMAL DISCOVERY REQUESTS FOR DOCUMENTS AND INTERROGATORIES, OCTOBER 8, 2021

1. PETITIONER MOVES for the Court to reconsider portions of its Order, dated March 4, 2022, in which the Court denied Petitioner's Motion To Compel Production Of Documents Responsive To Petitioner's Formal Discovery Requests For Documents And Interrogatories, dated October 8, 2021 ("Petitioner's Motion to Compel").

I. BACKGROUND AND ANALYSIS

2. For the last 3½ years, Respondent has refused to meaningfully participate in informal discovery, despite the Court's clearly stated preference.

3. For the last 3½ years, Respondent has consistently refused to meaningfully participate in formal discovery, in flagrant disregard for Tax Court Rule 70(b), which states that,

> "*The information or response sought through discovery may concern any matter not privileged and* ***which is relevant to the subject matter*** *involved in the pending case.* ***It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence****, regardless of the burden of proof involved.*"[1]

4. For the last 3½ years, Respondent has adamantly stood behind its "*litigating position*" in contradiction to Tax Court Rule 70(b) stating:

> "*Information outside of the information considered by the WB office, including current transcripts are not relevant.* ***It is the litigation position of counsel to not provide information outside of the claim file.***"[2]

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[1] T.C. Rule 70(b).

[2] See the email from opposing counsel to Petitioner, dated December 6, 2019, provided as **Exhibit A** to Petitioner's Motion

5. For the last 3½ years, Respondent has willfully misstated the holding in *Kasper v. Commissioner*, 150 T.C. 2 (2018) ("*Kasper*") as supporting Respondent's legally-deficient position that no documents outside of the IRS Whistleblower Office's claim file are subject to discovery.

6. In *Kasper*, the Tax Court was addressing the issue of what constitutes the Agency Administrative Record and the numerous exceptions that exist for allowing documents outside of the Agency Administrative Record to be admissible and considered by the Tax Court.

7. In *Kasper*, the Tax Court did not consider, address or conclude anything about a different standard for discovery in tax whistleblower cases.

8. The Tax Court has been very clear that this standard for discovery applies to tax whistleblower cases and how it applies to tax whistleblower cases. As recently as 2015, in resolving this same discovery dispute between Respondent and a different tax whistleblower, the Tax Court unequivocally stated that,

> *"Rule 70 governs discovery, and paragraph (b) thereof provides that the scope of discovery is "any matter not privileged and which*

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to Compel. See also the email from opposing counsel's supervisor to Petitioner, dated May 4, 2021, provided as **Exhibit B** to Petitioner's Motion to Compel (confirming Respondent's intentional refusal to comply and Respondent's insistence that the Court involve itself in this dispute about the fundamental standard for discovery).

> *is relevant to the subject matter involved in the pending case." The paragraph further provides:* ***"It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence". The standard of relevancy in a discovery action is liberal.*** *See* Melea Ltd. v. Commissioner, *118 T.C. 218, 221 (2002).* ***The information and responses petitioners seek are clearly relevant to petitioners' theory of their case:*** *They are looking for evidence that will prove that one or more collections of proceeds from the target were attributable to the information petitioners."*[3]

9. In that case, the Tax Court also addressed and rejected Respondent's current "*litigating position*" when the Tax Court unequivocally stated that

> "***Rather, [Respondent's] relevance objection is based solely on a generalized view that our scope of review should be limited to the "administrative record" and the information petitioners seek is outside that record. Respondent's argument is not a sufficient basis to deny petitioners' discovery requests. Even were we to agree with respondent as to the scope of review, he cannot unilaterally decide what constitutes an administrative record.***

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[3] *Whistleblower One 10683-13W v. Comm.*, 145 T.C. 8 (Sept. 16, 2015).

> *See Thompson v. DOL, 885 F.2d 551, 555 (9th Cir. 1989); Tenneco Oil Co. v. DOE, 475 F. Supp. 299, 317 (D. Del. 1979). How could evidence related to whether there was a collection of proceeds and whether that collection was attributable to the whistleblower 's information not be part of any purported administrative record? Any such evidence goes to the very basic factual inquiries required by section 7623(b).* ***Respondent's lack of direct response to petitioners' motions appears to indicate that the current "administrative record" is incomplete.*** *See Tenneco Oil Co. v. DOE, 475 F. Supp. at 317-318 (allowing discovery to complete the administrative record); see also Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) ("The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters.".")*[4]

10. Thus, the Tax Court has clearly rejected Respondent's desired standard for discovery in tax whistleblower cases (i.e., that discovery in tax whistleblower cases is limited to only the documents included by the IRS Whistleblower Office in their administrative file). Rather, the Tax Court has confirmed that the standard for discovery in tax whistleblower cases is the same as in all other cases – **the liberal standard of being relevant to the subject matter without regard for admissibility**.

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[4] *Id.*

11. On October 8, 2021, after giving Respondent sufficient notice of Respondent's continuing non-compliance with Tax Court Rule 70(b) and the controlling judicial precedent and after giving Respondent ample opportunity to comply, Petitioner filed its Motion to Compel requesting that the Court (1) reject Respondent's contentions that discovery in tax whistleblower cases is limited to only documents in the IRS Whistleblower Office's files; (2) reject Respondent's vague and legally-deficient objections; and (3) compel Respondent to produce documents responsive to Petitioner's Formal Discovery Requests for Documents #1 through #15 and responses to Petitioner's Interrogatories #5 through #11 pursuant to Tax Court Rule 70(b) and Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure.

12. In the Court's earlier Order, dated March 4, 2022, the Court stated that

> "*In accord with the Court's September 22, 2021 Order remanding this to the WBO for further consideration, . . . , petitioner's motion to compel production of documents is denied without prejudice*".

13. In Respondent's Status Update, dated August 29, 2022, Respondent stated that "*after careful consideration, the Whistleblower Office will not be issuing supplemental determination letters at this time*" bringing the year-long remand process to its expected fruitless conclusion.

14. In response to Petitioner's Status Update, dated October 29, 2022, the parties attended a conference call with the Court, during which time Judge Choi indicated that a Motion for Reconsideration would be a more appropriate vehicle for Petitioner's request than Petitioner's Status Update.

II. CONCLUSION

15. Because Respondent's fruitless remand process is now over, the basis for the Court's original denial of Petitioner's Motion to Compel no longer exists.

16. Regardless of how the appellate courts may rule in their resolution of *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. Jan. 11, 2022), *Kennedy v. Commissioner*, No 21-1133 (D.C. Cir) or *Lissack v. Commissioner*, No 21-1268 (D.C. Cir), discovery in this dispute will still be required, because Respondent issued an award determination letter (which is factually-distinguishable in a legally-significant way from those three (3) cases in which a rejection or denial letter was issued), Respondent arbitrarily and capriciously determined that Petitioner's §7623(b) claims were §7623(a) claims[5], and Respondent arbitrarily and capriciously determined that there was no possibility of future collected proceeds (despite the 20-year carry forward period of net operating losses).

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[5] See the Tax Court's Order, dated October 28, 2022, fn. 1, which states "*We note that respondent has acknowledged that the 2015-016670 claim is a section 7623(b) claim*."

17. As such. having patiently waited for over 3½ years for meaningful discovery to commence, Petitioner now kindly requests that the Court reconsider its earlier Order, dated March 4, 2022, denying Petitioner's Motion to Compel, dated October 8, 2021.

18. As part of that reconsideration. Petitioner also kindly requests that the Tax Court: (1) reject again Respondent's asserted "*litigating position*" that discovery is limited to only the documents in Respondent's IRS Whistleblower Office's files; (2) reject Respondent's vague and legally-deficient objections; and (3) compel Respondent to produce documents responsive to Petitioner's Formal Discovery Requests for Documents #1 through #15 and responses to Petitioner's Interrogatories #5 through #11 pursuant to Tax Court Rule 70(b) and Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure.

Respectfully submitted this the 5th day of November, 2022,

[redacted]
Whistleblower 5903-19W
Petitioner

Docket No. 5903-19W

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing PETITIONER'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED MAY 18, 2022, DENYING PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PETITIONER'S FORMAL DISCOVERY REQUESTS FOR DOCUMENTS AND INTERROGATORIES, OCTOBER 8, 2021 was served on Respondent by mailing the same on November 5, 2022, in a postage-paid properly-addressed envelope with adequate postage thereon to ensure delivery addressed as follows:

Mr. Jonathan M. Pope
Senior Attorney (LB&I)
Internal Revenue Service
Office of Chief Counsel
4050 Alpha Road
13th Floor
MC 200 NDAL
Dallas, TX 75244

Respectfully submitted this the 5th day of November, 2022,

[redacted]
Whistleblower 5903-19W
Petitioner

UNITED STATES TAX COURT

WHISTLEBLOWER 5903-19W, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent	DOCKET NO. 5903-19W Filed Under Seal

ORDER

On August 30, 2021, Petitioner submitted its Formal Discovery Requests for Documents #1 through #14.

On August 30, 2021, Petitioner submitted its Formal Request for Interrogatories, #1 through #11.

On September 3, 2021, Petitioner submitted its Formal Discovery Request for Documents #15.

On October 4, 2021, Respondent declined to provide the requested documents, asserted Respondent's erroneous "*litigating position*" that discovery in whistleblower cases is limited to only the documents in Respondent's IRS WBO files and declined to identify and articulate any defenses to the production of the requested documents.

On October 4, 2021, Respondent declined to provide responses to Interrogatories #5 through #11 and

declined to identify and articulate any defenses to the production of the requested documents.

To date, Respondent has failed to respond to Petitioner's Formal Discovery Request for Documents #15.

Having reviewed Petitioner's Motion for Reconsideration of the Court's Order, dated March 4, 2022, and because Respondent has asserted an erroneous and improper standard for discovery contrary to Tax Court Rule 70(b) and controlling precedents, has failed to provide the required documents and responses to interrogatories and has failed to identify and articulate any legally-sufficient defense for its refusal, it is

ORDERED that Respondent will cease and desist from asserting its erroneous discovery standard that discovery in whistleblower cases is limited to only the documents in Respondent's IRS WBO files in this case and any other case involving a tax whistleblower. It is further

ORDERED that Respondent will apply the correct standard for discovery to all of Petitioner's future discovery requests.

ORDERED that Respondent will provide Petitioner with copies of responsive documents as requested in Petitioner's Formal Discovery Requests for Documents #1 - #15 no later than thirty (30) days from the date of this order. It is further

ORDERED that Respondent will provide Petitioner with responses to Petitioner's interrogatories

#5 - #11 no later than thirty (30) days from the date of this order. It is further

ORDERED that Respondent will review each of Petitioner's *Branerton* requests and provide an updated and corrected response to Respondent's prior responses consistent with the application of the correct standard for discovery, no later than sixty (60) days from the date of the order. It is further

ORDERED that Respondent will correct and update each instance where Respondent has previously asserted a defense such that the assertion of a defense complies with Tax Court Rules 39 and 40, no later than sixty (60) days from the date of the order.

Judge _____

Entered:

* * * * * *

[SEAL] **United States Tax Court**
Washington, DC 20217

WHISTLEBLOWER 5903-19W Petitioner v. Commissioner of Internal Revenue Respondent	Docket No. 5903-19W

ORDER

On April 1, 2019, petitioner filed the petition to commence this whistleblower case pursuant to Internal Revenue Code section 7623. Petitioner seeks review of a notice of determination concerning whistleblower action, dated March 5, 2019.

On January 6, 2020, petitioner filed a motion for partial summary judgment, which he supplemented on January 7, March 2, and March 16, 2020. Respondent opposes petitioner's motion.

On May 12, 2020, respondent filed a motion to remand this case to the Whistleblower Office (WBO) for further consideration of petitioner's whistleblower claim. Respondent supplemented his motion to remand on February 12, 2021. Briefly, in his motion to remand, as supplemented, respondent asserts that, in the process of reviewing the administrative record in this case, respondent identified certain issues which need further investigation and evaluation by the

Whistleblower Office (WBO). Petitioner opposes respondent's motion to remand.

On May 18, 2021, citing the pending motions in this case and ongoing discovery disputes between the parties, respondent filed a motion for assignment of Judge. Petitioner opposes that motion.

Section 7623(b)(4) grants the Tax Court jurisdiction to review an IRS determination regarding a whistleblower award determination. In whistleblower cases, the Court reviews the administrative record to decide whether the Whistleblower Office abused its discretion in its determination regarding the whistleblower claim. See Kasper v. Commissioner, 150 T.C. 8 (2019). Our review of a whistleblower award determination is a "record rule" case under the Administrative Procedure Act, 5 U.S.C. secs. 551-559, 701-706 (2006), in which "summary judgment serves as a mechanism for deciding, as a matter of law, whether the * * * [WBO's] action is supported by the administrative record". Van Bemmelen v. Commissioner, 155 T.C.,(slip op. at 26) (Aug. 27, 2020). The administrative record may be supplemented for a number of reasons, such as when the agency fails to consider relevant factors. Kasper v. Commissioner, 150 T.C. at 20. In Whistleblower 769-16W v. Commissioner, 152 T.C. 172 (2019), we held that a whistleblower case may be remanded and that the Court would retain jurisdiction. The Court of Appeals for the District of Columbia, to which any appeal of this case would ordinarily lie, has stated that a reviewing court has broad discretion to grant or deny an agency's motion to remand and that an

agency's motion to remand is generally granted so long as the agency intends to take further action with respect to the original agency decision being reviewed. Id. (citing Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 436 (D.C. Cir. 2018). Remand allows an agency to cure mistakes rather than wasting courts' and parties' resources reviewing a record that is incorrect or incomplete. Id.

Here, the administrative record concerning petitioner's whistleblower claims in this case has not yet been filed in the Court's record. We must, therefore, deny petitioner's motion for partial summary judgment as premature. Furthermore, it appears that the administrative record currently may be incomplete or unclear regarding certain important points. Remanding petitioner's whistleblower claims for further consideration by the WBO will be the most efficient way to ensure that the administrative record is complete and to conserve the resources of the parties and the Court. Accordingly, we will grant respondent's motion to remand this case to the WBO for further consideration of petitioner's whistleblower claim and deny respondent's motion for assignment of Judge.

Served 09/22/21

Upon due consideration, it is

ORDERED that petitioner's motion for partial summary judgment, as supplemented, is denied without prejudice. It is further

ORDERED that respondent's motion for assignment of Judge is denied without prejudice. It is further

ORDERED that respondent's motion to remand, as supplemented, is granted and this case is remanded to respondent's Whistleblower Office for further investigation and a supplemental determination. It is further

ORDERED that the Court will maintain jurisdiction of this case and that, on or before February 18, 2022, the parties shall file status reports (preferably a joint report) concerning the then-current status of this case.

(Signed) Maurice B. Foley
Chief Judge

[SEAL] **Received** 02/12/21 12:21 pm **Filed** 02/12/21

WHISTLEBLOWER 5903-19W,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 5903-19W

First Supplement to MOTION TO REMAND by Resp. (OBJECTION)

Certificate of Service

SERVED 02/12/21

REDACTED

UNITED STATES TAX COURT

WHISTLEBLOWER 5903-19W, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)))))))	Docket No. 5903-19W Filed Electronically

SUPPLEMENT TO MOTION TO REMAND

RESPONDENT SUPPLEMENTS, pursuant to the Court's order dated February 10, 2021, Respondent's Motion to Remand filed May 12, 2020.

Respondent respectfully states:

1. On May 12, 2020, respondent filed its Motion to Remand this case to respondent's Whistleblower Office for further consideration.

2. The opening paragraph to respondent's Motion to Remand contains a scrivener's error. The opening paragraph in the Motion to Remand listed the relevant whistleblower claim numbers as "2013-002543, 2015-016670, 2017011232, 2017-011233, 2018-000759, 2018-000760, 2018-000763, and 2018000765."

3. The correct whistleblower claim numbers are 2013-007993, 2015- 016670, 2017-011232, 2017-011233,

2018-000759, 2018-00760, 2018-000763, and 2018-000765.

WILLIAM M. PAUL
Acting Chief Counsel
Internal Revenue Service

Date: February 12, 2021 By: /s/ Duy P. Tran
Duy P. Tran 2021.02.11 17:33:27 -06'00'
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Docket No. 5903-19W

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Supplement to Motion to Remand was served on petitioner by mailing the same on 2/12/2021 in a postage paid wrapper addressed as follows:

Pet. Name & Address

[redacted]

Date: February 12, 2021 By: /s/ Duy P. Tran 2021.02.11 17:32:42 -06'00'

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[SEAL] **United States Tax Court**
Washington, DC 20217

WHISTLEBLOWER 5903-19W Petitioner v. Commissioner of Internal Revenue Respondent	Docket No. 5903-19W

ORDER

On May 12, 2020, respondent filed a motion to remand to the Whistleblower Office for further consideration the following claim numbers of petitioner: 2013-002543, 2015-016670, 2017-011232, 2017011233, 2018-000759, 2018-00760, 2018-000763, and 2018-000765. The notice of determination upon which this case is based dated March 5, 2019, however, lists petitioner's claim numbers as 2013-007993, 2015-016670, 2017-011232, 2017-011233, 2018-000759, 2018-00760, 2018-000763, and 2018-000765.

Upon due consideration, it is

ORDERED that, on or before March 3, 2021, respondent shall file a supplement to his motion to remand and therein set forth an explanation concerning

the claim numbers to which his motion to remand relates.

(Signed) Maurice B. Foley
Chief Judge

Served 02/10/21

WHISTLEBLOWER 5903-19W, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent	ELECTRONICALLY FILED Docket No. 5903-19W

PETITIONER'S RESPONSE TO MOTION TO REMAND

eFiled: 05/29/2020 at 8:26 AM Eastern time
Transaction #: 676305

REDACTED

UNITED STATES TAX COURT

WHISTLEBLOWER 5903-19W, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent	DOCKET NO. 5903-19W [redacted copy filed electronically, unredacted copy filed by US mail]

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO REMAND

Pursuant to the Court's Order. dated May 12, 2020, and in opposition to Respondent's Motion to

Remand, dated May 12, 2020 ("Respondent's Motion"), Petitioner respectfully submits the following:

I. The Standard for Granting a Motion To Remand

1. Based on the Court's discussions in *Whistleblower 769-16W v. Comm.*, 152 T.C. 172 (2019) ("*WB 769-16W*") and in *Birkenfeld v. Comm.*, Docket No. 9896-17W[1] (currently before the Tax Court) ("*Birkenfeld*"), the applicable standard for the Court to apply when considering a motion to remand in a whistleblower dispute requires the Court to:

- ➢ determine that the Court has jurisdiction under §7623(b) to even entertain the motion to remand;
- ➢ determine what new fact or new law now exists that was not available to the IRS Whistleblower Office when it made its determinations;
- ➢ confirm that both parties agree on what the new fact or new law is that should be evaluated upon remand;
- ➢ determine that the IRS Whistleblower Office has not already reached a reviewable conclusion "*in the first instance*";

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[1] *Birkenfeld*, Order Granting Motion To Remand, issued May 1, 2020.

- ➢ confirm that the court's and the parties' resources will not be wasted by allowing remand;
- ➢ confirm that the non-moving party would not be unduly prejudiced by allowing remand; and
- ➢ determine that the agency's request to remand is not frivolous or made in bad faith.

2. In *WB 769-16W*, the Court begin its opinion by confirming its jurisdiction under §7623(b)(4), when the Court stated in the opening sentence "*[t]his whistleblower action was commenced pursuant to §7623(b)(4)*"[2] and neither party disputed that the claim under review was a §7623(b) claim.

3. Once the threshold jurisdictional issue was resolved in *WB 769-16W*, the Court stated that Respondent admitted that the administrative record upon which the Whistleblower Office based its determination "*is incomplete*"[3] because the administrative record did not address the related congressional committee report and whether or not the IRS used the information in that report (i.e., a party admission by Respondent that satisfies the "*abuse of discretion*" standard). In other words, in *WB 769-16W*, both parties agreed that the administrative record did not address the possible review of the congressional record[4] – the parties merely disputed over whether the Court or the IRS

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[2] *Id.* at 172.

[3] *Id.* at 179.

[4] *Id.* at 180.

Whistleblower Office should attempt to resolve that question first[5].

4. After discussing its jurisdiction, its scope of review and confirming that the *Chenery* doctrine[6] still applied to limit the court's review to "*the propriety of the Whistleblower Office's determination solely on the grounds it actually relied on in making its determination*"[7] and confirming that "*the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court*"[8], the Court then stated that "*[t]he validity of the agency determination "must, therefore, stand or fall on the propriety of that" determination, and if it "is not sustainable on the administrative record", then the matter must be remanded for further consideration*"[9]. The Court then concluded that "*in appropriate circumstances, this Court may remand a whistleblower case to the Whistleblower Office for further consideration*".[10]

5. In providing an overview of what these "*appropriate circumstances*" might be, in *WB 769-16W*, the Court suggested that "*agencies be allowed to cure their*

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[5] *Id.* (where the Court states "these determinations are all properly made by the Whistleblower Office in the first instance").

[6] *SEC v. Chenery Corp.*, 332 US 194, 196 (1947) ("*Chenery*").

[7] *WB 769-16W*, at 178.

[8] *Id.*, referring to *Camp v. Pitts*, 411 US 138, 142 (1973) ("*Camp*").

[9] *Id.*

[10] *Id.*

own mistakes rather than wasting the courts ' and the parties ' resources reviewing a record that ***both sides acknowledge to be incorrect or incomplete***".[11] The Court also suggested that "*[r]emand may also be appropriate if the agency's motion is* ***made in response to intervening events outside of the agency's control****, for example, a new legal decision or the passage of new legislation*".[12] Finally, the Court suggested that "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position".[13]

6. Additionally, in *WB 769-16W*, the Court also stated that it should "*consider whether remand would unduly prejudice the non-moving party*" or "*if the agency's request appears to be frivolous or made in bad faith*".[14]

II. Applying the Standard for Granting a Motion To Remand – Tax Court's Jurisdiction Under §7623(b)

7. The threshold step in considering Respondent's Motion To Remand is for the Court to determine whether it has jurisdiction to even consider the motion at all. The Court only has jurisdiction to review

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[11] *Id.* at 179.

[12] *Id.*

[13] *Id.*

[14] *Id.*

§7623(b) claims.[15] Quite simply, as submitted and consistent with Respondent's pleadings to date, Respondent's Motion To Remand fails to allege sufficient facts to allow the Court to have jurisdiction under §7623(b).

8. Although Petitioner has consistently claimed that at least two (2) of his claims are §7623(b) claims (because the acknowledgement letter from Respondent indicates at least one of these claims was received in 2015) and has consistently claimed that all but one of the remaining claims might be §7623(b) claims (because no acknowledgement letter was ever sent out by Respondent to contemporaneously confirm receipt prior to December 20, 2006), only one claim from all of Petitioner's other claims was affirmatively confirmed

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[15] §7623(b)(4), referring to only claims eligible under §7623(b)(1), (b)(2) and (b)(3). See also Wolf v. Comm., T.C. Memo 2007-133 (where the Tax Court clearly stated "*Newly enacted section 7623(b)(4), however, is made effective only for information provided to respondent on or after December 20, 2006, id. sec. 406(d), 120 Stat. 2960, and it provides the sole authorization for our jurisdiction to review respondent's denial of informant rewards*."). See also Whistleblower 10949-13W v. Comm., T.C. Memo 2014-106 (where the Tax Court clearly stated that "*The whistleblower has alleged sufficient jurisdictional facts to avail the whistleblower of section 7623(b)(1) for jurisdictional purposes and to overcome a motion to dismiss for lack of jurisdiction. If the whistleblower's alleged facts are proved at trial, they would establish that respondent proceeded against the targets using information the whistleblower provided after December 20, 2006. If these facts are established, the whistleblower is entitled to judicial review of respondent 's award determination*.").

by Respondent to Petitioner to have been received by Respondent before December 20, 2006.[16]

9. Throughout its pleadings filed with the Court, Respondent has consistently stated that all of Petitioner's claims are §7623(a) claims. Respondent's Motion To Remand makes no factual allegations (or party admissions) that any of Petitioner's claims are §7623(b) claims.

10. The parties disagree that any of Petitioner's claims are §7623(b) claims and until the Court definitively determines which claims are §7623(b) claims (or Respondent concedes the issue and identifies each §7623(b) claim by number and reference to Petitioner's original Form 211), the Court lacks jurisdiction to even consider Respondent's Motion To Remand. Furthermore, once the Court determines which of Petitioner's claims are §7623(b) claims (or Respondent concedes the issue and identifies that §7623(b) claim by number and reference to Petitioner's original Form 211), the Court only has jurisdiction over those §7623(b) claims and can only begin its analysis of the requirements to grant a motion to remand specific to those §7623(b) claims and any issues related thereto that were not

[16] See Exhibit A, letter from Respondent to Petitioner, from sometime after February 16, 2006, where Respondent clearly states in its hand-written note that "*I find no other records of 211's sent please resubmit*". Thus, at least as of February 16, 2006, no more than one claim on Respondent's Final Award Decision letter, dated March 5, 2019, had been received by Respondent.

previously considered by the IRS Whistleblower Office in the "*first instance*".

III. Applying the Standard for Granting a Motion To Remand – Determine the New Fact or New Law That the Agency Could Not Include in Its Original Determination

11. The second step in considering Respondent's Motion To Remand is for the Court to determine what new fact or new law now exists that was not available to the IRS Whistleblower Office when it made its original determinations. Quite simply, Respondent's Motion To Remand raises no new fact or new law that the IRS Whistleblower Office was not aware of when it issued its Final Award Decision letter, dated March 5, 2019.

12. In Respondent's Motion To Remand, Respondent suggests that the Court grant its request to remand to allow Respondent to consider Petitioner's employment status and also to allow Respondent to consider whether the two (2) 2015 claims should be treated as §7623(b) claims.[17]

13. Respondent's Motion To Remand, however, fails to identify any new fact or new law that impact either of those two (2) issues.

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[17] Respondent's Motion To Remand, para. 14.

No New Facts – Petitioner's Employment Status

14. Respondent has known Petitioner's identity since Petitioner filed its first Form 211. Respondent has known of Petitioner's employment status since Petitioner became an employee. As Respondent admitted in Respondent's Motion To Remand, those began overlapping in 2005.[18] Quite simply, Respondent has known since 2005 that Petitioner had filed a Form 211 and was also an employee. Thus, Petitioner's employment status is not a new fact that Respondent only discovered after the issuance of its Final Award Decision letter, dated March 5, 2019.

15. Additionally, in 2005, when Petitioner was hired by Respondent, Petitioner was assigned a shared workspace with the Revenue Agent who was the assigned Senior Team Coordinator ("the STC") for one of the taxpayers covered by Petitioner's Form 211. Sometime before March 2006, Petitioner was approached by the STC who asked Petitioner if he had a minute for a hypothetical technical tax question. Because technical tax questions are what tax professionals live for, Petitioner replied in the affirmative. The STC then inquired if Petitioner had any previous experience with the whistleblower statute. Petitioner averred that he indeed had some working familiarity with the whistleblower statute. At which point, the STC asked if Petitioner had ever considered the issue of whether a Treasury employee could be eligible for an award.

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[18] Respondent's Motion To Remand, para. 5.

16. Having reviewed that very issue before submitting the Form 211, Petitioner confirmed to the STC that Petitioner had indeed reviewed the controlling statute and regulations and concluded that as long as the Treasury employee was reporting information that the employee learned before they came onboard (i.e., was not something they learned about during their employment), then there was no prohibition limiting their eligibility for an award. The STC nodded his head and stated "*Yep, that's where we came down on it, too*" and walked off.

17. Therefore, by March 2006, Petitioner's status as an employee and as the whistleblower was known by the STC on one of the taxpayers covered by the Form 211 – the STC being the sole agent on that case with access to and responsibility for the whistleblower case file (at the IRS Exam level). Thus, Petitioner's employment status is not a new fact to Respondent. Equally important, Petitioner's employment status had already been considered by the STC when determining a whistleblower award (at the IRS Exam level), who determined that it was not an impediment to issuing an award to Petitioner.

18. Finally, in September 2011, Petitioner was assigned a §6700 Committee audit as part of his inventory. At that time, the review process for issuing a §6700 Committee report required its review by the IRS' Financial Services Industry.

19. Beginning in November 2011 and continuing through August 2013, Petitioner exchanged more than

95 emails with Kimberlee Loren, the assigned Financial Services Industry Analyst.

20. In September 2012, a heated technical disagreement occurred over the phone between Petitioner and Kimberlee Loren, in which Kimberlee Loren started yelling at Petitioner over the phone, screaming "*You don't know me*!" and "*I do this every day*!" Petitioner disengaged from that phone call and notified his team manager. This ultimately led to a larger conference call between Petitioner, Petitioner's team manager, Kimberlee Loren and the Financial Services Industry team manager, at which point it was agreed that Petitioner should work more directly with that Financial Services Industry team manager, because of the high level of animosity exhibited by Kimberlee Loren towards Petitioner. Suffice to say, that call had a lasting impression on Petitioner.

21. In July 2013, while still working with Petitioner on the §6700 Committee audit, Kimberlee Loren sent Petitioner a letter, dated July 22, 2013, confirming that she was now the new "Management Analyst, Whistleblower Office" assigned to Petitioner's claims.[19] Thus, there was an overlapping period of time where Kimberlee Loren was working directly with Petitioner on the §6700 Committee audit in his capacity as a Treasury employee and was simultaneously assigned as the IRS Whistleblower Office management analyst to Petitioner's claims.

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[19] See Exhibit B, letter from Kimberlee Loren, dated July 22, 2013

22. From July 2013 through January 2018, Kimberlee Loren remained the assigned management analyst on Petitioner's claims until she was replaced by Ken Chatham.[20] **For a period of more than four (4) years, the IRS Whistleblower Office allowed an employee of the IRS Whistleblower Office with an inherent conflict of interest and a deep animosity towards Petitioner to be assigned as the management analyst to Petitioner's claims, which provided that employee with the opportunity to create, sanitize and compromise the whistleblower administrative files related to Petitioner's claims.** Thus, anything in the IRS Whistleblower administrative files that predated the assignment of Kimberlee Loren as the management analyst to Petitioner's claims or was created during the assignment of Kimberlee Loren as the management analyst to Petitioner's claims is inherently suspect, because of Kimberlee Loren's conflict of interest and deep animosity for Petitioner. **Moreover, any subsequent determinations that rely on these now incurably unreliable whistleblower administrative files specific to Petitioner's claims are themselves inherently biased and unsupported.**

23. In any event, however, Petitioner's employment status is not a new fact to Respondent, is not a new fact to the IRS Whistleblower Office and is definitely not a new fact to Kimberlee Loren, the IRS

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[20] See Exhibit C, letter from Kimberlee Loren, dated January 25, 2018.

Whistleblower Office management analyst who was assigned to Petitioner's claims for over four (4) years.

24. Thus, regardless of which date the Court chooses to focus on (the 2005 hiring of Petitioner, the 2006 discussion with the STC or the 2013 assignment of Kimberlee Loren as the management analyst to Petitioner's claims), Petitioner's employment status is not a new fact to Respondent or the IRS Whistleblower Office. Respondent was aware of Petitioner's employment status for many years before it issued its Final Award Decision letter, dated March 5, 2019, in which the IRS Whistleblower Office determined that Petitioner was eligible for an award even when it already knew Petitioner was an employee.

No New Facts – the Two (2) 2015 Claims

25. In its letter, dated July 30, 2015, the IRS Whistleblower Office acknowledged receiving at least one (1) of Petitioner's two (2) claims.[21]

26. From that date until it issued its Preliminary Award Recommendation letter, dated January 31, 2019, Respondent issued no "rejection" or "denial" letters specific to the two (2) 2015 claims (or any of Petitioner's other claims).

27. In the Preliminary Award Recommendation letter, dated January 31, 2019, the IRS Whistleblower Office aggregated all of Petitioner's claims and treated

[21] See Exhibit D, acknowledgment letter from IRS Whistleblower Office, dated July 30, 2015.

them as §7623(a) claims when it identified all the claim numbers covered by its Preliminary Award Recommendation letter and captioned that letter as "**PRELIMINARY AWARD RECOMMENDATION UNDER SECTION 7623(a)**".[22]

28. In Petitioner's reply, dated February 14, 2019, Petitioner identified the two (2) claims filed in 2015 and stated that "*these applications for reward fall under the current award regime, which mandate a payout percentage of between 15-30% and apply a maximum limitation of $10M – well above the limitations under the prior regime*" (referring to §7623(b)).[23]

29. Despite Petitioner's reply, dated February 14, 2019, in its Final Award Decision letter, dated March 5, 2019, the IRS Whistleblower Office again aggregated all of Petitioner's claims and treated them as §7623(a) claims when it identified all the claim numbers covered by its Final Award Decision letter and captioned that letter as "**FINAL AWARD DECISION UNDER SECTION 7623(a)**".[24]

30. Thus, at the time Respondent issued both its Preliminary Award Recommendation letter and its Final Award letter, Respondent was already aware of the facts surrounding the two (2) 2015 claims and even after being reminded by Petitioner that those two (2)

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[22] See Exhibit E, Preliminary Award Recommendation letter, dated, January 31, 2019.

[23] See Exhibit F, Petitioner's letter, dated February 14, 2019.

[24] See Exhibit G, Final Award Decision letter, dated March 5, 2019.

2015 claims were definitively §7623(b) claims, the IRS Whistleblower Office went ahead aggregated those two (2) 2015 claims and treated them as §7623(a) claims in its Final Award Decision letter, dated March 5, 2019.[25]

31. In fact, in its pleadings previously filed with the Court, Respondent has already defended its position that these two (2) 2015 claims were properly treated as §7623(a) claims in Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, where Respondent stated "*The Whistleblower Office Did Not Abuse Its Discretion When It Aggregated Petitioner's 2015 Forms 211 with his Pre-enactment Forms 211*".[26]

32. Thus, Respondent has identified no new facts specific to the two (2) 2015 claims that were not already available to the IRS Whistleblower Office when it made its determination on March 5, 2019, that the two (2) 2015 claims were §7623(a) claims when it included them on its "**FINAL AWARD DECISION UNDER SECTION 7623(a)**" and continues to defend that determination in its pleadings previously filed with the Court.

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[25] See Exhibit G.

[26] Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, page 7, para. header B.

No New Law – Petitioner's Employment Status

33. In Respondent's Motion To Remand, Respondent fails to identify the new law that it was unaware of when it issued its Final Award Decision letter, dated March 5, 2019.

34. Quite simply, there has been no new law on this issue since Respondent issued its regulations seeking to narrow the eligibility of certain individuals from receiving awards – a concept that was and is not in the controlling statute.

35. Quite simply, there has been no new law on this issue since Respondent determined that Petitioner's employment status did not preclude him from receiving an award when it issued its Final Award Decision letter, dated March 5, 2019.

36. As previously identified above, Respondent has been aware of Petitioner's employment status since the 2005 hiring of Petitioner, the 2006 discussion with the STC (and the STC's conclusion that Petitioner's employment status does not make Petitioner ineligible for an award) or the 2013 assignment of Kimberlee Loren as the management analyst to Petitioner's claims. Thus, in all cases, Respondent had at least six (6) years to consider how Petitioner's employment status might impact an award.

37. The controlling law has not changed. The underlying regulations that seek to narrow the statutory language have not changed. In 2005, Petitioner concluded that an employee's employment status should

only limit an award when the information the award is based on was learned while an individual was employed by Respondent. In 2006, the STC (an IRS employee) reached that same conclusion. Sometime after 2013, Kimberlee Loren also reached that same conclusion (she never issued a "rejection" or "denial" letter based on her knowledge of Petitioner's employment status). In 2019, the IRS Whistleblower Office issued its Final Award Decision letter, dated March 5, 2019, in which it determined that Petitioner was entitled to an award, while already knowing that Petitioner was an employee.

38. **Suddenly, in 2020, Respondent now wants to propose a different conclusion, based on a very twisted interpretation of the regulations that none of the other involved IRS employees shared, but is merely Respondent's attempt to disguise a weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard.**

39. Regardless of Respondent's counsel's preferred litigation narrative, Respondent's Motion To Remand has not identified a single new law that impacts the issue of Petitioner's employment.

No New Law – the Two (2) 2015 Claims

40. In Respondent's Motion To Remand, Respondent fails to identify the new law that it was

unaware of when it issued its Final Award Decision letter, dated March 5, 2019.

41. Quite simply, there are two types of awards that informants may be eligible to receive under §7623. The two types of awards are split between §7623(a) claims and §7623(b) claims. §7623(a) claims and §7623(b) claims are mutually-exclusive. A claim for reward can only ever be one of the two types of claims, but never both types of claims.

42. There are several meaningful differences between §7623(a) claims and §7623(b) claims. First, awards for §7623(a) claims are discretionary, while awards for §7623(b) claims are mandatory.[27]

43. Second, the awards for §7623(a) claims are determined in a different manner from awards for §7623(b) claims (e.g., the applicable range of an award percentage is higher for §7623(b) claims).[28]

44. Finally, the most meaningful difference is that award determinations for §7623(a) claims are not appeallable to any court, while award determinations for §7623(b) claims are only reviewable by the Tax Court (if a petition is timely-filed).[29]

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[27] Compare §7623(a) vs. §7623(b)(1).

[28] §7623(b)(1).

[29] §7623(b)(4), referring to only claims eligible under §7623(b)(1), (b)(2) and (b)(3). See also *Wolf v. Comm.*, T.C. Memo 2007-133 (where the Tax Court clearly stated "*Newly enacted section 7623(b)(4), however, is made effective only for information provided to respondent on or after December 20, 2006, id. sec. 406(d), 120 Stat. 2960, and it provides the sole authorization for our*

45. There has been no new law on this issue since the IRS Whistleblower Office issued its Final Award Decision letter, dated March 5, 2019, and improperly aggregated Petitioner's two (2) 2015 claims and treated them as §7623(a) claims.

46. This legally-deficient and factually-unsupported determination is already the subject of Petitioner's Motion For Partial Summary Judgment, dated January 3, 2020. Respondent has already filed its response to that motion, dated February 24, 2020. Petitioner has already filed its rebuttal to Respondent's response, dated March 2, 2020. In none of those filings do the parties identify any new law on the issue of determining whether a claim is a §7623(a) claim or a §7623(b) claim.

47. Moreover, Respondent's own pleadings in this case (i.e., Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, in which Respondent argues that "*The Whistleblower Office Did Not Abuse Its*

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jurisdiction to review respondent's denial of informant rewards."). See also *Whistleblower 10949-13W v. Comm.*, T.C. Memo 2014-106 (where the Tax Court clearly stated that "*Nile whistleblower has alleged sufficient jurisdictional facts to avail the whistleblower of section 7623(b)(1) for jurisdictional purposes and to overcome a motion to dismiss for lack of jurisdiction. If the whistleblower's alleged facts are proved at trial, they would establish that respondent proceeded against the targets using information the whistleblower provided after December 20, 2006. If these facts are established, the whistleblower is entitled to judicial review of respondent's award determination*."). See also *Dacosta v. US*, 82 Fed. Cl. 549 (2008).

Discretion When It Aggregated Petitioner's 2015 Forms 211 with his Pre-enactment Forms 211"[30]) contradict statements in Respondent's Motion To Remand that it wants to reconsider the issue of whether the two (2) 2015 claims are indeed §7623(b) claims. Respondent considered it in 2019. Respondent's counsel considered it in February 2020. Both times, Respondent has concluded that the two (2) 2015 claims are §7623(a) claims. **Despite this, Respondent requests yet a third opportunity to reconsider this issue, but has still not identified the new law that it would like the IRS Whistleblower Office to apply on remand (that it was not already aware of)**.

IV. Applying the Standard for Granting a Motion To Remand – Confirm that Both Parties Agree on What the New Facts or New Law is that Should Be Evaluated Upon Remand

48. The third step in considering Respondent's Motion To Remand is for the Court to confirm that both parties agree on what the new fact or new law is that should be evaluated upon remand. Quite simply, Respondent's Motion To Remand raises no new fact or new law that the IRS Whistleblower Office was unaware of when it issued its Final Award Decision letter, dated March 5, 2019. Thus, it is impossible for the parties to agree as to what the new fact is that warrant

[30] Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, page 7, para. header B.

remand or what the new law is that should be applied upon remand. There is no new fact and no new law for the IRS Whistleblower Office to consider upon remand. **Respondent is merely attempting to disguise a weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard.**

V. Applying the Standard for Granting a Motion To Remand – Determine that the IRS Whistleblower Office Has Not Already Reached a Reviewable Conclusion "*In The First Instance*"[31]

49. The fourth step in considering Respondent's Motion To Remand is for the Court to balance the competing interests of the Chenery doctrine (that limit the Court's review to being "solely on the grounds [the agency] actually relied on in making its determination"[32]) while also allowing agencies the first opportunity to make a decision based on new facts or new law.[33]

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[31] *WB 769-16W*, at 180 (where the Court states "*these determinations are all properly made by the Whistleblower Office in the first instance*"). See also *Birkenfeld*, at 5 (where the Court stated that "*[u]nder section 7623(b)(1), it is the statutory province of the Whistleblower Office in the first instance to make the "determination of the amount" of any whistleblower award"*).

[32] *Id.* at 178, describing the *Chenery* doctrine.

[33] *Id.* at 180 (where the Court states "*these determinations are all properly made by the Whistleblower Office in the first*

50. These are competing interests that need to be balanced for the very simple reason that to allow a perpetual, never-ending series of continuing re-re-re-reconsiderations by an agency of its determinations every time the agency merely admitted that it made a mistake would undermine parties' confidence in the judicial function (ignoring the obvious lack of confidence in the administrative function generated by a never-ending series of 'do-ovens' by an agency until the opposing party dies).

51. This is particularly the case when the standard for review of an agency's decision is the "*abuse of discretion*" standard, which can only be satisfied when a determination is arbitrary, capricious, or without sound basis in fact or law.[34] After all, if an agency's decision is without basis in fact or law, then it satisfies the "*abuse of discretion"* standard for judicial involvement, but would also appear to satisfy the much lower "*allow an agency to correct its mistakes*" standard that Respondent is advocating for as the standard for a motion to remand to correct an agency's mistake (i.e., a decision without basis in fact or law).[35] Respondent's proposed view would effectively render the Court's judicial power moot, other than to be the babysitter of an

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instance"). See also Birkenfeld, at 5 (where the Court stated that "*[u]nder section 7623(b) (1), it is the statutory province of the Whistleblower Office in the first instance to make the "determination of the amount" of any whistleblower award*").

[34] Murphy v. Comm., 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006). See also Kasper v. Comm., 150 TC No. 2.

[35] Respondent's Motion To Remand, para. 16.

ever-continuing series of mistakes followed by remands until the opposing party quits out of frustration. Because of these competing interests and in order to respect the Court's power, agencies should be given the first opportunity to make a determination based on all the facts and all the law. **But once that first determination is made, rightly or wrongly, it is the responsibility of the Court to correct those decisions that satisfy the "*abuse of discretion*" standard.**

First Opportunity to Consider – Petitioner's Employment Status

52. As described above, regardless of which date the Court chooses to focus on (the 2005 hiring of Petitioner, the 2006 discussion with the STC or the 2013 assignment of Kimberlee Loren as the management analyst to Petitioner's claims), Petitioner's employment status is not a new fact. Respondent was aware of Petitioner's employment status for many years before it issued its Final Award Decision letter, dated March 5, 2019, in which the IRS Whistleblower Office determined that Petitioner was eligible for an award even when it already knew Petitioner was an employee. **Thus, Respondent has already had the first opportunity (over a period of many years) to consider the issue of Petitioner's employment status and concluded that Petitioner's employment status did not limit Petitioner's eligibility for an award.**

First Opportunity to Consider – the Two (2) 2015 Claims

53. As described above, Respondent was already aware of the facts surrounding the two (2) 2015 claims (i.e., when they were filed). Even after being reminded by Petitioner that those two (2) 2015 claims were definitively §7623(b) claims, the IRS Whistleblower Office went ahead aggregated those two (2) 2015 claims and treated them as §7623(a) claims.[36]

54. In fact, in its pleadings previously filed with the Court, Respondent has already defended its position that these two (2) 2015 claims were properly treated as §7623(a) claims in Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, where Respondent stated "*The Whistleblower Office Did Not Abuse Its Discretion When It Aggregated Petitioner's 2015 Forms 211 with his Pre-enactment Forms 211*".[37] **Thus, Respondent has already had the first and second opportunity (over a period of many years since 2015) to consider the issue of these two (2) 2015 claims and has both times concluded that these two (2) 2015 claims were §7623(a) claims**.

55. As it relates to the two issues that Respondent identified in Respondent's Motion To Remand that it wanted to reconsider, both have already been

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[36] Respondent's Response to Petitioner's Motion For Summary Judgment, As Supplemented, dated February 24, 2020, page 7, para. header B.

[37] *Id.*

considered by the IRS Whistleblower Office, which documented its determinations in the Final Award Decision letter, dated March 5, 2019.

VI. Applying the Standard for Granting a Motion To Remand – Confirm That the Court's and the Parties' Resources Will Not Be Wasted By Allowing Remand

56. The fifth step in considering Respondent's Motion To Remand is for the Court to make sure that remanding the issue will not waste the court's or parties' resources. Quite simply, allowing the IRS Whistleblower Office yet another opportunity to consider issues that they have already considered wastes everyone's resources.

57. The IRS Whistleblower Office has already had nearly fifteen (15) years to complete their initial consideration of all the issues.

58. Since Petitioner filed its petition with the Court, dated March 29, 2019, the IRS Whistleblower Office has had another fourteen (14) months to complete any reconsideration of any issues that they want to concede. **Despite having had nearly fifteen (15) years and an additional fourteen (14) months in which to compete their initial consideration and any reconsideration of any issues that they want to concede, the IRS Whistleblower Office failed to complete its reconsideration in that time.**

Respondent is Wasting Respondent's Resources

59. Since the petition was filed fourteen (14) months ago, nothing has prohibited the IRS Whistleblower Office from reviewing its whistleblower administrative files and conceding any issues that Respondent wants to concede. The IRS Whistleblower Office could have spent the last fourteen (14) months completing whatever reconsideration they are proposing to start now and submitted that to the Court as a Party Admission by Respondent.

60. But Respondent has decided not to use its time and resources effectively. Instead, Respondent has waited for nearly fourteen (14) months to identify two weak litigating positions that it now wants to disguise as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard. **Thus, Respondent is wasting its own resources.**

Respondent is Wasting Petitioner's Resources

61. Petitioner waited for nearly fifteen (15) years before the IRS Whistleblower Office finally issued its Final Award Decision letter, dated March 5, 2019.

62. For the last fourteen (14) months, Petitioner has been attempting to get copies of relevant documents from Respondent, including documents that should have been in the whistleblower administrative files but were not (e.g., attribute roll-forward schedules

and current IDRS transcripts for all taxpayers for all years), in order to understand what the IRS Whistleblower Office actually did.

63. Respondent has repeatedly asserted to Petitioner that "*Information outside of the information considered by the WB office, including current transcripts are not relevant. It is the litigation position of counsel to not provide information outside of the claim file.*"[38] In other words, it is Respondent's litigating position that nothing outside of the whistleblower administrative files are relevant to resolve the current dispute. It is also Respondent's litigating position that the determinations made by the IRS Whistleblower Office are fully supported by the whistleblower administrative files. If that is indeed the case, then there is nothing for the IRS Whistleblower Office to reconsider.

64. By allowing Respondent to continue with these mutually-exclusive narratives (i.e., the determinations by the IRS Whistleblower Office are supported by the complete and sufficient whistleblower administrative files, while simultaneously requesting a 'do-over' because its determinations are incorrect), the Court would be allowing Respondent to waste even

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[38] See Exhibit H, email from Respondent's counsel, dated December 6, 2019 (and attached to Petitioner's Motion To Deem Respondent's Insufficient Denials In Its Answer As Party Admissions By Respondent, dated December 23, 2019). Although Petitioner disagrees with Respondent as to what might be relevant and discoverable under the applicable discovery rules, Petitioner offers this statement as confirmation of Respondent's belief that the documents in Respondent's possession are complete and sufficient.

more of Petitioner's resources. **Justice delayed is justice denied.**

Respondent is Wasting the Court's Resources

65. Finally, by allowing Respondent to continue with these mutually-exclusive narratives, the Court is allowing Respondent to waste the Court's resources.

66. *"Respondent's counsel's obligation as a public servant is to assist the court to reach the correct result, even if it is adverse to respondent's original determination*."[39] This is a very laudable goal. And as a public servant, Petitioner agrees with this obligation.

67. Unfortunately, Mr. Ken Chaberski, Associate Area Counsel (LB&I) does not share this same laudable understanding of the role of the Office of Chief Counsel. In his letter to Petitioner, dated April 7, 2020, Mr. Chaberski stated a different understanding of his role, namely that "*the Office of Chief Counsel's role is to defend the determination made by the Whistleblower Office*".[40]

68. Mr. Chaberski views his role to be that of defending the determination made by the IRS Whistleblower Office and not necessarily that of seeking the truth or assisting the Court to reach the correct result, despite the clear language in the Internal Revenue Manual that the role of the Office of Chief Counsel "*is*

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[39] Internal Revenue Manual 35.6.2.9 (effective 8/11/04).

[40] See Exhibit I, letter from Mr. Ken Chaberski, dated April 7, 2020.

to assist the court to reach the correct result, even if it is adverse to respondent's original determination."[41] Thus, Mr. Chaberski's statement appears to confirm that the Office of Chief Counsel is willing to ignore the clear guidance in the Internal Revenue Manual that articulates the standard that Respondent's counsel is held to.

69. More importantly, however, is the second message conveyed in his letter, dated April 7, 2020. **Specifically, Mr. Chaberski stated that the Office of Chief Counsel "*does not intend . . . to resolve this matter other than by entry of a decision stipulating to the correctness of the Whistleblower Office's determination*".**[42]

70. **In other words, the Office of Chief Counsel continues to assert that the IRS Whistleblower Office's determinations are correct, that the Office of Chief Counsel will insist on the Court resolving the current dispute and that the Office of Chief Counsel will accept no other non-trial path to resolution.** If Respondent's counsel is to be believed (and Petitioner is inclined to believe them until they communicate something different), Respondent's counsel confirmed that it is not seeking the truth in the current dispute (but merely defending the determinations made by the IRS Whistleblower Office) and Respondent's counsel is insisting on a judicial opinion to resolve the current dispute. **Thus,**

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[41] Internal Revenue Manual 35.6.2.9 (effective 8/11/04).

[42] *Id*.

any delay to pursue any other alternative other than trial to resolve this dispute is a waste of the Court's time and the Court's resources.

VII. Applying the Standard for Granting a Motion To Remand – Confirm that the Non-Moving Party Would Not Be Unduly Prejudiced By Allowing Remand

71. The sixth step in considering Respondent's Motion To Remand is for the Court make sure that Petitioner, as the non-moving party, will not be unduly prejudiced by allowing remand. Quite simply, as discussed previously, **Respondent's Motion To Remand is merely an attempt to disguise a weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard**.

Petitioner is Unduly Prejudiced by a Higher Standard of Review

72. Raising the standard of review from the "*de novo*" standard for litigating positions raised by Respondent's counsel after the filing of the petition to the higher and more stringent "*abuse of discretion*" standard that Petitioner must meet unduly prejudices Petitioner.

73. Respondent has identified no new facts or new law. Respondent has identified no issues that warrant a "*first instance*" reconsideration (i.e., something

that Respondent had not already made a determination on). Yet, Respondent is asking the Court to allow Respondent to disguise a weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard (i.e., that Petitioner is ineligible for an award merely because he is an employee, which is contrary to the determination by the IRS Whistleblower Office, and that Petitioner's §7623(b) claims do not meet the statutory definition under §7623(b)). **Unfortunately for Respondent, the IRS Whistleblower Office does not have the discretion to determine that they properly applied the law to the facts. That decision is for the Court to make – particularly so when the statutory provisions under §7623(b) are mandatory and definitional.**

Petitioner is Unduly Prejudiced by Respondent's Refusal to Promptly Pay the §7623(a) Award that Respondent Determined Was Owed on March 5, 2019

74. In *WB 769-16W*, in opposition to Respondent's Motion To Remand, when the whistleblower alleged that remand would delay the payment of the underlying §7623(b) award (which it obviously does), the Court focused on the fact that "*any award would have to await resolution of proceedings in this forum,*

which might well involve a trial, post-trial briefing, and possibly an appeal".[43]

75. In *Birkenfeld*, in opposition to Respondent's Motion To Remand, when the whistleblower alleged that remand would delay the payment of the underlying §7623(b) award (which it obviously does), the Court stated that "*Petitioner has failed to show that he is entitled as a matter of law to immediate payment.*"[44]

76. In each of those cases, the underlying whistleblower had appealed its §7623(b) claims to the Tax Court and identified that any payment of its §7623(b) award would be delayed by any remand.

77. Unlike those two cases, in the current case, **the IRS Whistleblower Office has utterly refused to pay Petitioner the §7623(a) award that it has already determined is owed to Petitioner until the appeal of Petitioner's §7623(b) claims are resolved.[45]**

78. In its response to Petitioner's Freedom of Information Act request for documents supporting the IRS Whistleblower Office's refusal to promptly pay Petitioner the §7623(a) award it determined it owed Petitioner in its Final Award Decision letter, dated March 5, 2019, as required by law, the IRS Whistleblower Office merely confirmed that Petitioner's §7623(a) award

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[43] *W13 769-16W*, at 181.

[44] *Birkenfeld*, at 6.

[45] See Exhibit 3, letter from Mr. Martin, Director, IRS Whistleblower Office, dated September 18, 2019.

was "*suspended while the case is pending and until resolved*".[46]

79. As the Court well knows, no court in the world has jurisdiction to review award determinations by the IRS Whistleblower Office as they relate to §7623(a) claims – no matter how wrong or unsupportable by the facts or the law those determinations might be.[47] Award determinations for §7623(a) claims are always immediately final upon issuance of the Final Award Decision letter, because those §7623(a) claims are not appeallable to any court. Thus, the determination by the IRS Whistleblower Office that it can suspend payment of the §7623(a) award pending the review and resolution of its §7623(b) determinations is without basis in fact or law.

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[46] *Id.*

[47] Wolf v. Comm., T.C. Memo 2007-133 (where the Tax Court clearly stated "*Newly enacted section 7623(b)(4), however, is made effective only for information provided to respondent on or after December 20, 2006, id. sec. 406(d), 120 Stat. 2960, and it provides the sole authorization for our jurisdiction to review respondent's denial of informant rewards.*"). See also Whistleblower 10949-13W v. Comm., T.C. Memo 2014-106 (where the Tax Court clearly stated that "*[t]he whistleblower has alleged sufficient jurisdictional facts to avail the whistleblower of section 7623(b)(1) for jurisdictional purposes and to overcome a motion to dismiss for lack of jurisdiction. If the whistleblower's alleged facts are proved at trial, they would establish that respondent proceeded against the targets using information the whistleblower provided after December 20, 2006. If these facts are established, the whistleblower is entitled to judicial review of respondent's award determination*."). See also Dacosta v. US, 82 Fed. Cl. 549 (2008).

80. At the same time, however, **despite the fact that its refusal to promptly pay over the non-appeallable §7623(a) award is without basis in fact or law, the IRS Whistleblower Office still refuses to pay the §7623(a) award until the §7623(b) claims are resolved** (or until a court orders the IRS Whistleblower Office to comply with the mandatory element of §7623(a) that awards be paid promptly).

81. Therefore, unlike the petitioners in *WB 769-16W* and *Birkenfeld*, where the §7623(b) awards were dependent on the Court's resolution of issues that were before the Court, in the instant case, **Petitioner is absolutely entitled to the immediate and current payment of its §7623(a) award**.[48] Because remand will delay the resolution of Petitioner's §7623(b) claims that are before the Court and the IRS Whistleblower Office has illegally suspended payment of Petitioner's §7623(a) award (that was immediately payable in March 2019) until the §7623(b) claims are resolved, any delay to the resolution of the §7623(b) claims necessarily delays the payment of Petitioner's §7623(a) award (that was immediately payable in March 2019). **Any further delay to the payment of Petitioner's §7623(a) award (that was immediately payable in March 2019) that might result from remanding any issue relating to a mutually-exclusive §7623(b) claim unduly prejudices Petitioner.**

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[48] In fact, Respondent was legally required to promptly remit payment of Petitioner's §7623(a) award on March 5, 2019.

VIII. Applying the Standard for Granting a Motion To Remand – Determine That the Agency's Request To Remand is Not Frivolous or Made in Bad Faith

82. The final step in considering Respondent's Motion To Remand is for the Court make sure that Respondent's Motion To Remand is not frivolous or made in bad faith. **Quite simply, because Respondent's Motion To Remand satisfies none of the salient requirements necessary for a motion to remand, Respondent's Motion To Remand is both frivolous and made in bad faith.**

83. Respondent's Motion To Remand makes no factual allegations (or party admissions) that any of Petitioner's claims are §7623(b) claims. In fact, Respondent continues to deny that any of Petitioner's claims are §7623(b) claims. Thus, Respondent's Motion To Remand is asking the Court to do something that it lacks the jurisdiction to do (based on Respondent's Motion To Remand and Respondent's other pleadings filed with the Court).

84. Respondent's Motion To Remand fails to identify any new fact or new law that impact either of the two (2) issues that Respondent would like to address on remand and that it has already addressed in its Final Award Decision letter, dated March 5, 2019.

85. Respondent's Motion To Remand contains many of its incorrect legal conclusions dressed up as factual statements that Petitioner disputes (e.g., Respondent's many references to "*pre-enactment claims*"

is disputed by Petitioner and conflicts with Respondent's letter, from sometime after February 16, 2006 that clearly identifies only a single claim having been received by Respondent prior to February 16, 2006[49]). The parties do not agree on the new fact or the new law to be applied on remand.

86. Respondent's Motion To Remand implies that the IRS Whistleblower Office has never completed its "*first instance*" consideration, despite the two issues that Respondent seeks to consider on remand having necessarily been reached in Respondent's Final Award Decision letter, dated March 5, 2019. With that letter, the IRS Whistleblower Office determined that Petitioner was eligible for an award (at a point in time where Petitioner's employment status had been known to Respondent for many years) and also determined that all of Petitioner's claims were §7623(a) claims (including the two (2) 2015 claims that were acknowledged as received in 2015, well after the December 20, 2006 enactment date and which were never "rejected" or "denied" by the IRS Whistleblower Office). Respondent had nearly fifteen (15) years to review its administrative records before it issued its Final Award Decision Letter, dated March 5, 2019, in which the IRS Whistleblower Office concluded that Petitioner's known employment status did not preclude an award and that

[49] See Exhibit A, letter from Respondent to Petitioner, from sometime after February 16, 2006, where Respondent clearly states in its hand-written note that "*I find no other records of 211's sent please resubmit*". Thus, at least as of February 16, 2006, no more than one claim on Respondent's Final Award Decision letter, dated March 5, 2019, had been received by Respondent.

the two (2) 2015 claims were §7623(a) claims. Respondent has already had its "*first instance*" consideration of the two issues it seeks to consider.

87. Respondent's Motion To Remand will waste Respondent's resources, Petitioner's resources and the Court's resources. Respondent has had nearly fifteen (15) years prior to issuing its Final Award Decision Letter, dated March 5, 2019, and an additional fourteen (14) months since the petition was filed to complete any second or third consideration of its determinations that it only now proposes to even begin.

88. Because Respondent has decided not to use its time and resources effectively and waited for nearly fourteen (14) months to identify two weak litigating positions that it now wants to disguise as a determination by the IRS Whistleblower Office to subject its review to the higher "*abuse of discretion*" standard, Respondent is wasting its own resources. Because Respondent continues to assert two (2) mutually-exclusive narratives (i.e., the determinations by the IRS Whistleblower Office are supported by the complete and sufficient administrative files, while simultaneously requesting a 'do-over' because its determinations are incorrect), the Court would be allowing Respondent to waste Petitioner's resources. Finally, given **Mr. Chaberski statements that the Office of Chief Counsel "*does not intend . . . to resolve this matter other than by entry of a decision stipulating to the correctness of the Whistleblower Office's determination*"**[50], pursuing any other alternative other

[50] *Id.*

than trial to resolve this dispute is a waste of the Court's time and the Court's resources.

89. Respondent's Motion To Remand would unduly prejudice Petitioner in two (2) ways. First, granting Respondent's Motion To Remand raises the standard of review for litigating positions raised by Respondent's counsel after the filing of the petition from the "*de novo*" standard to the higher and more stringent "*abuse of discretion*" standard by disguising Respondent's weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard. Second, granting Respondent's Motion To Remand unduly prejudices Petitioner because it would further delay the payment of Petitioner's §7623(a) award until the resolution of these §7623(b) claims, something that Respondent lacks the legal authority to do, but yet still refuses to promptly pay over the §7623(a) award it previously determined was owed to Petitioner, as required by law. **Thus, Respondent's Motion To Remand fails to satisfy any of the requirements that must be resolved in Respondent's favor to grant its motion.**

IRS Office of Chief Counsel – Background

90. In fiscal year 2018, the IRS Office Chief Counsel received 25,463 Tax Court cases contesting an IRS determination of additional taxes and closed 26,341 Tax Court cases involving more than $7.5 billion in

disputed taxes and penalties.[51] Quite simply, the IRS Office of Chief Counsel litigates more cases before the Tax Court than any other tax law firm in the world.

91. Despite all this experience and knowledge, Respondent's Motion To Remand failed to identify what the actual standard is for the Court to grant its request. Despite having previously filed numerous such requests to remand before the Tax Court for just whistleblower cases, in its current motion, Respondent failed to identify what the actual standard is for the Court to grant Respondent's Motion To Remand. Despite having filed many such requests to remand before the Tax Court on unrelated tax technical issues in other cases, in its current motion, Respondent failed to identify what the actual standard is for the Court to grant Respondent's Motion To Remand. Given its vast experience with filing these requests to remand, Respondent should have a well-defined and often-reviewed template that at least addresses the legal standard that it must meet when filing such a request. Yet, **Respondent's current motion to remand is conspicuously missing even a good faith attempt to identify the requirements that must be resolved in Respondent's favor to grant its motion**.

92. In Respondent's Motion To Remand, Respondent alleges no fact that would support the Court finding that it has jurisdiction to consider Respondent's Motion, because Respondent's narrative has consistently been that all of Petitioner's claims are §7623(a) claims.

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[51] https://www.irs.gov/statistics/chief-counsel.

93. In Respondent's Motion To Remand, Respondent fails to identify the specific dates on which each of Petitioner's seven (7) claims were received by Respondent, but consistently refers to all of the claims as "*pre-enactment claims*".[52] If the specific dates are known, then they should be readily identified in Respondent's pleadings, because the dates are legally-significant. **That Respondent refuses to identify these legally-significant dates to the Court while simultaneously asserting that they all must have occurred before December 20, 2006 is irrational and unsupportable.** Respondent cannot assert to the Court that those claims were received before December 20, 2006 unless Respondent knows with certainty which date each claim was received (and states as much to the Court). Yet, Respondent's Motion To Remand states these factually unsupported legal conclusions (that are disputed by Petitioner) as facts.

94. In Respondent's Motion To Remand, Respondent vaguely refers to "*allowing the Whistleblower Office to correct its own potential mistakes rather than needlessly wasting the parties' and the Court's resources*" as the standard for granting a motion to remand and then blithely fails to apply that standard to the known facts.[53]

95. Respondent fails to identify what its mistake was – the mistake was definitely not a failure to consider the two (2) issues described in Respondent's Motion To Remand, because each of those two (2) issues

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[52] Respondent's Motion To Remand, para. 6.

[53] Respondent's Motion To Remand, para. 5.

were necessarily addressed in the "*first instance*" in the Final Award Decision letter, dated March 5, 2019, **where the IRS Whistleblower Office concluded Petitioner was entitled to an award and clearly stated that the two (2) 2015 claims were §7623(a) claims**.

96. Respondent fails to identify what new fact or law was subsequently developed since it issued its Final Award Decision letter, dated March 5, 2019.

97. Respondent ignores its own legally-unsupportable decision to suspend payment of Petitioner's §7623(a) award until the current dispute over Petitioner's §7623(b) claims is resolved. The unsupportable continuing delay of an immediately-payable award is definitely a burden on Petitioner.

98. Finally, the statements by Mr. Chaberski that "*the Office of Chief Counsel's role is to defend the determination made by the Whistleblower Office*"[54] and that the Office of Chief Counsel "*does not intend . . . to resolve this matter other than by entry of a decision stipulating to the correctness of the Whistleblower Office's determination*"[55] confirms that Respondent has no interest in resolving this dispute through a reasonable reconsideration by the IRS Whistleblower Office. Mr. Chaberski confirmed that it is Respondent's position that the initial determination by the IRS Whistleblower Office was correct and that the only path of resolution was trial. As such, Respondent's

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[54] See Exhibit I, letter from Mr. Ken Chaberski, dated April 7, 2020.

[55] *Id.*

Motion To Remand is not a good faith attempt to allow Respondent to reconsider its initial determinations, but rather merely Respondent's attempt to disguise a weak litigating position as a determination by the IRS Whistleblower Office in order to artificially strengthen its proposed litigating position with the "*abuse of discretion*" standard. **Thus, Respondent's Motion To Remand is both frivolous and made in bad faith.**

THE TAX COURT SHOULD DENY RESPONDENT'S MOTION TO REMAND BECAUSE RESPONDENT FAILS TO SATISFY ANY OF THE REQUIREMENTS IN THE STANDARD FOR GRANTING ITS MOTION TO REMAND

Because Respondent's Motion To Remand fails to allege sufficient facts to support the Court's jurisdiction to consider its motion, misstates the legal standard for granting a motion to remand and fails to address the requirements of the legal standard for granting a motion to remand, Petitioner respectfully requests that the Court **DENY** Respondent's Motion To Remand.

Moreover, given the frivolous nature of Respondent's Motion To Remand that Respondent submitted in bad faith, Petitioner also requests that the Court **sanction** Respondent, as appropriate, to discourage such conduct in the future.

Respectfully submitted this the 29th day of May, 2020,

[Petitioner's Signature]
Whistleblower 5903-19W
Petitioner

ALTERNATIVELY – PETITIONER'S REQUEST FOR RESTRICTIONS AND SCOPE LIMITATIONS IF THE COURT GRANTS RESPONDENT'S MOTION TO REMAND

Although the Court should deny Respondent's Motion To Remand for the many reasons identified above, should the Court grant Respondent's Motion To Remand, the following restrictions and limitations should be included in that order to limit the amount of the parties' resources that are wasted by remand and to quickly get the issue(s) back before the Court for its review:

I. Respondent must identify which claim(s) are §7623(b) claims and Respondent's identification will be a binding party admission on Respondent;

II. Respondent may only reconsider issues on remand specific to §7623(b) claims as identified above by Respondent;

III. Respondent will provide copies of current IDRS transcripts for each §7623(b) claim identified by Respondent for each taxpayer's tax year from the initial year covered by the §7623(b) claim through and including each

subsequent year possibly impacted by a carry-over tax attribute (e.g., net operating losses);

IV. Respondent will affirmatively identify Respondent's asserted date of receipt for each of Petitioner's claims in writing to the Court under penalties of perjury;

V. Respondent will affirmatively identify the new fact or new law that it wishes to 'reconsider' in a written statement to the Court under penalties of perjury that will include a written affirmation as to when the new fact or new law occurred;

VI. Respondent will complete its 'reconsideration' within thirty (30) days from the date the Court grants Respondent's Motion To Remand (having already had nearly fifteen (15) years and an additional fourteen (14) months to complete such 'reconsideration');

VII. Respondent will promptly pay Petitioner his §7623(a) award, including interest, within thirty (30) days from the date the Court grants Respondent's Motion To Remand (with Petitioner to provide Respondent with the amount of interest owed within ten (10) days from the date the Court grants Respondent's Motion To Remand); and

VIII. the Court will treat any new or different conclusions or additional supporting rationale proposed by Respondent following remand as a party admission that Respondent's initial determination satisfied the "*abuse of discretion*" standard.

EXHIBIT A – Respondent's Letter, dated on or after February 16, 2006

[Petitioner's Name
& Address
& Phone #]

February 6, 2006

Marie Kawaguchi
Manager, Team 103
Internal Revenue Service
Attn: ICE, MIS 4110
1973 N. Rulon White Blvd.
Ogden, UT 84404

RE: Additional Forms 211

Dear Mrs. Kawaguchi,

I received your response dated January 31, 2006 and it is indicative of the problem I am working to resolve. As I have previously and repeatedly indicated, I have submitted several Forms 211 and have been unable to identify which claim number has been assigned to which issue. Moreover, each time I have requested assistance from the IRS, I receive correspondence like your latest reply that does not advance the issue, but rather only continues to muddy the waters.

Yes, I am aware that the IRS has denied my request for a reward for Claim # 2950006, but no one has been able to determine which of my four (4) Forms 211 this denial applies to. Can you identify which claim it is? I have copies of the original Forms 211, so if you could refer to them by the date I completed them, that would be incredibly helpful.

And to follow-up on the other three outstanding claims that I referred to in my previous correspondence that you did not confirm in your letter dated January 31, 2006, I kindly ask that review your files and provide me with an update of these claims by claim number to allow me to appropriately follow-up.

In summary, please provide me with the following:

1.) Summary of Forms 211 received by your office from me.

/s/ *I find no other records of 211's sent please resubmit.*

2.) Identify claim numbers that were assigned to these Forms 211.

3.) Status update of the outstanding Forms 211 (i.e.. excluding claim #2950006).

If you have any questions or need any additional information, please give me a call.

[Comment by Petitioner] [Petitioner's Signature & Name]
[Received stamps with dates]

IRS, resubmittal of Forms 211, 2.6.06.doc
02/06/06
Page 1 of 1

**EXHIBIT B – Respondent's Letter,
from Kimberlee Loren,
dated July 22, 2013**

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
Washington, DC 20224
Whistleblower Office

July 22, 2013

[Petitioner's Name
& Address]

Re: Claim #2013-007993 (Legacy #29-50006)

Dear [Petitioner's Name]

Please be advised that the above referenced open claim is now being coordinated by me.

My contact information:

Internal Revenue Service
Attn: Kimberlee H. Loren
400 N. 8th Street, Box 26
Richmond, VA 23219-4838
Phone (804) 916-8280

Sincerely,

/s/ Kimberlee H. Loren
Kimberlee H. Loren
Management Analyst
Whistleblower Office

EXHIBIT C – Respondent's Letter, from Kimberlee Loren, dated January 25, 2018

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
Washington, DC 20224
Whistleblower Office

January 25, 2018

[Petitioner's Name
& Address]

Re: Claims 2013-007993, 2015-016670, 2017-011232, 2017-011233, 2018-000744 2018-000759, 2018-000760, 2018-000763, 2018-000765

Dear [Petitioner's Name]

Please be advised that your claim submissions are now being coordinated by Senior Tax Analyst Ken Chatham. Mr. Chatham's contact information is:

Internal Revenue Service
400 West Bay Street
Jacksonville, FL 32202
Attn: K Chatham, M/S 1234
Phone: (904) 661-3128

Sincerely,

/s/ Kimberlee H. Loren
Kimberlee H. Loren
Senior Tax Analyst

EXHIBIT D – Respondent's Acknowledgment Letter, from IRS Whistleblower Office, dated July 30, 2015

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
Washington, DC 20224
Whistleblower Office
July 30, 2015

[Petitioner's Name
& Address]

RE: [taxpayer's Name]

Dear [Petitioner's Name]

We received your Form 211 with the information you furnished and have assigned it claim number 2015-016670.

The information you provided will be evaluated to determine if an investigation is warranted and an award is appropriate. Although we may need to contact you to discuss the information submitted, we can not tell you specific details about what actions we will be taking, if any using the information you gave us. Internal Revenue Code Section 6103 protects the tax information of all taxpayers and prevents us from making these disclosures. At the conclusion of the review and investigation, we will only be able to tell you whether or not the information you provided met our criteria for paying an award.

Should you have any questions, Whistleblower Office analyst Kimberlee Loren has been assigned to your claim and can be reached at (804) 916-8280.

Sincerely,

/s/ Charise Wood
Charise Wood
Manager
ICE Team-Ogden

EXHIBIT E – Respondent's Preliminary Award Recommendation letter, dated January 31, 2019

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
WASHINGTON, D.C. 20224
Whistleblower Office

January 31, 2019

[Petitioner's Name
& Address]

Re: Claim Number(s): 2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

Dear Sir:

PRELIMINARY AWARD RECOMMENDATION UNDER SECTION 7623(a)

The Whistleblower Office has reached a preliminary award recommendation under Internal Revenue Code 7623(a) based on your Form 211, Application for Award for Original Information dated 6/13/2004, this includes any additional information you may have provided in relation to the Form 211. Enclosed is a Summary Report that explains our preliminary award recommendation in the amount of $ 650,910.34. If there are any changes to the recommended award percentage or the amount of collected proceeds as reflected in the Summary Report, then the Whistleblower Office will send you a revised Preliminary Award Recommendation Letter.

The Budget Control Act of 2011. as amended by the American Tax Relief Act of 2012, requires that automatic reductions be made with respect to certain government payments. These required reductions include a reduction to awards paid under Internal Revenue Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your preliminary recommended award reflects a reduction in accordance with the Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%. The final award amount will use the reduction required in the year of payment.

Awards payable under section 7623 are includible in the gross income of the recipients and are subject to federal tax reporting and withholding requirements. Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30%. In addition, if you have any outstanding Federal tax liabilities (including interest and penalties) or Treasury Offset Program debts, the award amount will be applied to the amount you owe and any remaining balance will be paid to you. You must report the total award amount on your income tax return even if any amounts are applied to outstanding tax liabilities. A Form 1099 will be sent to you that will report the full amount of the award and the amount of the taxes withheld.

As of the date of this preliminary award recommendation, there is no possibility the IRS will collect post-decision proceeds.

This preliminary award recommendation letter begins the whistleblower award administrative proceeding.

If you agree with this preliminary award recommendation:

1. Check the appropriate box, sign and date the enclosed Response to Summary Report form indicating your agreement; and

2. Return the signed form to us.

By checking the box, you agree with the preliminary award recommendation and accept it an an award decision.

If you do not agree with the Whistleblower Office preliminary award recommendation and wish to submit comments:

1. Check the appropriate box, sign and date the enclosed Response to Summary Report form; and
2. Return the signed Response to Summary Report along with any comments to the preliminary award recommendation to the Whistleblower Office within 30 days from the date of this letter.
3. The Whistleblower Office will consider any comments received and send a Final Award Determination Letter.

Any documents described above including the signed and dated Response to Summary Report and comments must be mailed to

Ken Chatham
Internal Revenue Service, Whistleblower Office
400 West Bay Street
Jacksonville, FL 32202
Attn: M/S 1234

If you have any questions, you may write to Ken Chatham at the Whistleblower Office address above, or call 904-661-3128. If you write, please include your

telephone number and the best time to call you if we need more information.

Sincerely,

/s/ Ken Chatham for Ken Chatham

Lee D. Martin, Director
Whistleblower Office

Enclosures: Summary Report
Response to Summary Report

Summary Report

Whistleblower Name:
[Petitioner's Name]

Whistleblower Office Claim Number(s):
2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

---

1. Preliminary tax, penalties, interest and other amounts collected based on information provided by Whistleblower: $ 6,939,342.59

2. Recommended Award Percent: 10%

3. Preliminary Award: Collected proceeds (Line 1) x recommended award percent (Line 2): $ 693,934.26

4. Preliminary Budget Control Act reduction (Line 3 amount x 6.2 percent): $ 43,023.92

   The Budget Control Act of 2011, as amended by the American Tax Relief Act of 2012, requires that

automatic reductions be made with respect to certain government payments. These required reductions include a reduction to awards paid under Internal Revenue Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your preliminary recommended award reflects a reduction in accordance with Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%. The final award amount will use the reduction required in the year of payment

5. **Preliminary recommended IRC section 7623(a) Award Amount (Line 3 less Line 4):** $ 650,910.34

   Awards payable under section 7623 are includible in the gross income of the recipient and subject to federal tax reporting and withholding requirements Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30%. In addition, the IRS may offset awards payable under section 7623 against any outstanding Federal income tax liabilities or Treasury Offset Program debts that may be owed by you if our records reflect that you have an outstanding balance. Calculation of the amount due, if applicable, will be made at the time of the award payment.

6. Factors that contributed to the recommended award percentage.

The intermediate award percentage of 10% is appropriate and reasonable for this claim for award. This award percentage is prescribed in the Internal Revenue Manual for pre-enactment claim for award cases where the Whistleblower's information, though it did not start the examination or investigation of the taxpayers, was of value in the detemination of tax liabilities although not specific".

Response to Summary Report

Whistleblower Name:
[Petitioner's Name]

Whistleblower Office Claim Number(s):
2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

After receipt of the Summary Award Report under IRC § 7623(a) from the IRS Whistleblower Office, dated January 31, 2019,

☐ I agree with the preliminary award recommendation and accept it as an award decision.

☐ I disagree with the preliminary award recommendation. I understand that if I wish to provide comments regarding the Summary Award Report such comments must be submitted within 30 days of the date of the letter transmitting the Summary Award.

Whistleblower Signature: _____ Date: _____

EXHIBIT F – Petitioner's letter, dated February 14, 2019

4-pages, redacted in its entirety

EXHIBIT G – Respondent's Final Award Decision letter, dated March 5, 2019

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
WASHINGTON, D.C. 20224
Whistleblower Office

March 5, 2019

[Petitioner's Name
& Address]

Re: Claim Number(s): 2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

Dear Sir:

FINAL AWARD DECISION UNDER SECTION 7623(a)

The Whistleblower Office has considered your Form 211, Application for Award for Original Information, dated June 13, 2004, this includes any additional information you may have provided in relation to the Form 211. On January 31, 2019, the Whistleblower Office sent you a preliminary award recommendation. The Whistleblower Office reviewed the comments you

provided on the preliminary award recommendation. The Whistleblower Office has made a final decision that you are entitled to an award of $ 650,910.34.

The Budget Control Act of 2011, as amended by the American Tax Relief Act of 2012, requires that automatic reductions be made with respect to certain government payments. These required reductions include a reduction to awards paid under Internal Revenue Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your award reflects a reduction in accordance with the Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%.

This award is taxable income in the year that you receive it. Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30% In addition, if you have any outstanding Federal tax liabilities (including interest and penalties) or Treasury Offset Program debts, the award amount will be applied to the amount you owe and any remaining balance will be paid to you. You must report the total award amount on your income tax return even if any amounts are applied to outstanding tax liabilities. A Form 1099 will be sent to you that will report the full amount of the award and the amount of the taxes withheld.

As of the date of this final award recommendation, there is no possibility the IRS will collect post-decision proceeds.

The Whistleblower Office will process the award for payment as promptly as the circumstances permit.

If you have any questions, you may call the Whistleblower Office at 904-661-3128.

Sincerely,

/s/ Ken Chatham for Ken Chatham

Lee D. Martin, Director
Whistleblower Office

Enclosures: Determination Report

Determination Report

Whistleblower Name:
[Petitioner's Name]

Whistleblower Office Claim Number(s):
2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

---

1. Final tax, penalties, interest and other amounts collected based on information provided by Whistleblower: $ 6,939,342.59

2. Recommended Award Percent: 10%

3. Final Award: Proceeds (Line 1) x recommended award percent (Line 2). $ 693,934.26

4. Final Budget Control Act reduction (Line 3 amount x 6.2 percent): $ 43,023.92

   The Budget Control Act of 2011, as amended by the American Tax Relief Act of 2012, requires that automatic reductions be made with respect to certain government payments. These required reductions include a reduction to awards paid under Internal Revenue Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your preliminary recommended award reflects a reduction in accordance with Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%. The final award amount will use the reduction required in the year of payment.

5. **Determined IRC section 7623(a) Award Amount (Line 3 less Line 4):** $ 650,910.34

   Awards payable under section 7623 are includible in the gross income of the recipient and subject to federal tax reporting and withholding requirements in the year of receipt. Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30%. In addition, the IRS may offset awards payable under section 7623 against any outstanding Federal income tax liabilities or Treasury Offset Program debts that may be owed by you

if our records reflect that you have an outstanding balance. Calculation of the amount due, if applicable, will be made at the time of the award payment.

6. Factors that contributed to the recommended award percentage:

   The intermediate award percentage of 10% is appropriate and reasonable for this claim for award. This award percentage is prescribed in the Internal Revenue Manual for pre-enactment claim for award cases where the Whistleblower's information, though it did not start the examination or investigation of the taxpayers, was of value in the detemination of tax liabilities although not specific".

EXHIBIT H – Respondent's email, from Respondent's counsel, dated December 6, 2019

12/6/2019 Yahoo Mail - Response to Letters

Response to Letters

From: Tran Duy P (duy.p.tran@irscounsel.treas.gov)

To: [Petitioner's email address]

Date: Friday, December 6, 2019, 12:03 PM EST

[Petitioner's Name]

I've provided everything that the WB office has in the claim file. The standard of review is abuse of discretion by the WB office. Information outside of the information considered by the WB office, including current

transcripts are not relevant. It is the litigation position of counsel to not provide information outside of the claim file.

I am still working on a working index on the electronic files that were provided to me, and which I have provided to you in turn. When I am close to finishing that index, I am happy to provide that information in turn, even though that is generally not a standard practice in litigation.

Duy P. Tran
Attorney (LB&I)

4050 Alpha Road, 13th Floor
Mail Code: 2000 NDAL
Dallas, Texas 75244

Phone: 469-801-1101
Fax: 855-631-9892

EXHIBIT I – Respondent's letter, from Mr. Ken Chaberski, dated April 7, 2020

[SEAL]
OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
LARGE BUSINESS & INTERNATIONAL
4050 ALPHA ROAD
13TH FLOOR, MC 2000 NDAL
DALLAS, TX 75244
(469) 801-1101
EFAX: 855-631-9892 /
INT'L EFAX: 304-707-9052

April 7, 2020

CC:LB:4:MIA

Via Encrypted Electronic Mail

[Petitioner's Name]
[Petitioner's email Address]

Re: Whistleblower 5903-19W Commissioner
Docket No 5903-19W
Response to April 3, 2020 letter and April 5, 2020 e-mail

Dear [Petitioner's Name]

This letter responds to your April 3, 2020 letter and follow-up e-mail from April 5, 2020 regarding settlement discussions in the above-referenced case.

Pursuant to I.R.C. § 7623, only the IRS Whistleblower Office has authority to make determinations

on a whistleblower's claim for award under sections 7623(a) and (b). In whistleblower cases before the Tax Court, the Office of Chief Counsel's role is to defend the determination made by the Whistleblower Office. In the present case, it is our position that the Whistleblower Office did not abuse its discretion with regard to its final award decision. Accordingly, this office does not intend to entertain your current offers or any future offers to resolve this matter other than by the entry of a decision stipulating to the correctness of the Whistleblower Office's determination.

If you have any questions about this, please let me know.

Sincerely,

KIRK S. CHABERSKI
Associate Area Counsel (LB&I)

By: /s/ Duy P. Tran
Duy P. Tran
Senior Attorney (LB&I)

EXHIBIT J – Respondent's letter, from Mr. Martin, Director, IRS Whistleblower Office, dated September 18, 2019

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
WASHINGTON, D.C. 20224
Whistleblower Office

September 18, 2019

[Petitioner's Name
& Address]

Dear [Petitioner's Name]

I am responding to your request dated June 30, 2019, addressed to Mr. Mnuchin, Secretary of the Treasury. Mr. Rettig, IRS Commissioner, and Mr. Martin, Director, Whistleblower Office, concerning your award for original information and for documents under the Freedom of Information Act (FOIA).

The FOIA portion of your request was forwarded to the Disclosure Office for reply.

Regarding payment of your award, it has been suspended because you filed a petition in Tax Court. This action indicates you do not agree with the final determination.

Our instructions, located at IRM 25.2.2.7.2.1(2)c state. "The Whistleblower Office will process the payment as promptly as circumstances permit, but not until there has been a final determination of tax with respect to the action(s), the Whistleblower Office has determined

the award, and all appeals of the Whistleblower Office's determination are final or the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the determination."

The award is suspended while the case is pending and until resolved.

I hope this answers your questions about your award.

Sincerely,

/s/ Lee D. Martin

Lee D. Martin, Director,
Whistleblower Office

Docket No. 5903-19W

DECLARATION BY PETITIONER

I declare and certify under penalty of perjury under the laws of the United States of America that each of Exhibits A - J attached to the foregoing is a true and correct copy of the original document.

Executed on this the 29th day of May, 2020,

[Petitioner's Signature]

Whistleblower 5903-19W
Petitioner

Docket No. 5903-19W

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO REMAND was served on Respondent by mailing the same on May 29, 2020, in a postage-paid properly-addressed envelope with adequate postage thereon to ensure delivery addressed as follows:

Mr. Duy P. Tran
Attorney (LB&I)
Internal Revenue Service
Office of Chief Counsel
4050 Alpha Road
13th Floor
MC 2000 NDAL
Dallas, TX 75244-4203

Respectfully submitted this the 29th day of May, 2020,

[Petitioner's Signature]

Whistleblower 5903-19W
Petitioner

Response to Letters

From: Tran Duy P (duy.p.tran@irscounsel.treas.gov)

To: theslayor@yahoo.com

Date: Friday, December 6, 2019, 12:03 PM EST

Mr. Tindall,

I've provided everything that the WB office has in the claim file. The standard of review is abuse of discretion by the WB office. Information outside of the information considered by the WB office, including current transcripts are not relevant. It is the litigation position of counsel to not provide information outside of the claim file.

I am still working on a working index on the electronic files that were provided to me, and which I have provided to you in turn. When I am close to finishing that index, I am happy to provide that information in turn, even though that is generally not a standard practice in litigation.

Duy P. Tran
Attorney (LB&I)

4050 Alpha Road, 13th Floor
Mail Code: 2000 NDAL
Dallas, Texas 75244

Phone: 469-801-1101
Fax: 855-631-9892

DEPARTMENT OF THE TREASURY
[SEAL] **INTERNAL REVENUE SERVICE**
WASHINGTON, D.C. 20224
Whistleblower Office

March 5, 2019

James W. Tindall
4674 Jefferson Township Place
Marietta, GA 30066

Re: Claim Number(s): 2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

Dear Sir:

FINAL AWARD DECISION UNDER SECTION 7623(a)

The Whistleblower Office has considered your Form 211, Application for Award for Original Information, dated June 13, 2004, this includes any additional information you may have provided in relation to the Form 211. On January 31, 2019, the Whistleblower Office sent you a preliminary award recommendation. The Whistleblower Office reviewed the comments you provided on the preliminary award recommendation. The Whistleblower Office has made a final decision that you are entitled to an award of $ 650,910.34.

The Budget Control Act of 2011, as amended by the American Tax Relief Act of 2012, requires that automatic reductions be made with respect to certain government payments. These required reductions include a reduction to awards paid under Internal Revenue

Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your award reflects a reduction in accordance with the Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%.

This award is taxable income in the year that you receive it. Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30%. In addition, if you have any outstanding Federal tax liabilities (including interest and penalties) or Treasury Offset Program debts, the award amount will be applied to the amount you owe and any remaining balance will be paid to you. You must report the total award amount on your income tax return even if any amounts are applied to outstanding tax liabilities. A Form 1099 will be sent to you that will report the full amount of the award and the amount of the taxes withheld.

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The Whistleblower Office will process the award for payment as promptly as the circumstances permit.

If you have any questions, you may call the Whistleblower Office at 904-661-3128.

Sincerely,

/s/ Ken Chatham for Ken Chatham

Lee D. Martin, Director
Whistleblower Office

Enclosures: Determination Report

Determination Report

Whistleblower Name:
James W. Tindall

Whistleblower Office Claim Number(s):
2013-007993 (master) and 2015-016670, 2017-011232, 2017-011233, 2018-000744, 2018-000759, 2018-000760, 2018-000763, and 2018-000765 (related)

---

1. Final tax, penalties, interest and other amounts collected based on information provided by Whistleblower: $ 6,939,342.59

2. Recommended Award Percent: 10%

3. Final Award: Proceeds (Line 1) x recommended award percent (Line 2): $ 693,934.26

4. Final Budget Control Act reduction (Line 3 amount x 6.2 percent): $ 43,023.92

   The Budget Control Act of 2011, as amended by the American Tax Relief Act of 2012, requires that automatic reductions be made with respect to

certain government payments. These required reductions include a reduction to awards paid under Internal Revenue Code section 7623. The required reduction percentage is determined annually by the Office of Management and Budget for the year in which payments are made. As a result, your preliminary recommended award reflects a reduction in accordance with Office of Management and Budget guidance for the 2019 Fiscal Year reduction amount of 6.2%. The final award amount will use the reduction required in the year of payment.

5. **Determined IRC section 7623(a) Award Amount (Line 3 less Line 4):** $ 650,910.34

   Awards payable under section 7623 are includible in the gross income of the recipient and subject to federal tax reporting and withholding requirements in the year of receipt. Generally, whistleblower awards paid to U.S. citizens or resident aliens in excess of $10,000 will be subject to a 24% withholding for federal income tax. Payments to foreign persons will be treated as fixed, determinable, annual, or periodical (FDAP) income and withheld at 30%. In addition, the IRS may offset awards payable under section 7623 against any outstanding Federal income tax liabilities or Treasury Offset Program debts that may be owed by you if our records reflect that you have an outstanding balance. Calculation of the amount due, if applicable, will be made at the time of the award payment.

6. Factors that contributed to the recommended award percentage:

The intermediate award percentage of 10% is appropriate and reasonable for this claim for award. This award percentage is prescribed in the Internal Revenue Manual for pre-enactment claim for award cases where the Whistleblower's information, though it did not start the examination or investigation of the taxpayers, "was of value in the detemination of tax liabilities although not specific".

Whit Tindall
1297 Myrtle Creek Drive
Norcross, GA 30093
(770) 564-9059

February 6, 2006

Marie Kawaguchi
Manager, Team 103
Internal Revenue Service
Attn: ICE, M/S 4110
1973 N. Rulon White Blvd.
Ogden, UT 84404

RE: Additional Forms 211

Dear Mrs. Kawaguchi,

I received your response dated January 31, 2006 and it is indicative of the problem I am working to resolve. As I have previously and repeatedly indicated, I have submitted several Forms 211 and have been unable to identify which claim number has been assigned to which issue. Moreover, each time I have requested assistance from the IRS, I receive correspondence like your latest reply that does not advance the issue, but rather only continues to muddy the waters.

Yes, I am aware that the IRS has denied my request for a reward for Claim # 2950006, but no one has been able to determine which of my four (4) Forms 211 this denial applies to. Can you identify which claim it is? I have copies of the original Forms 211, so if you could refer to them by the date I completed them, that would be incredibly helpful.

And to follow-up on the other three outstanding claims that I referred to in my previous correspondence that you did not confirm in your letter dated January 31, 2006, I kindly ask that review your files and provide me with an update of these claims by claim number to allow me to appropriately follow-up.

In summary, please provide me with the following:

1.) Summary of Forms 211 received by your office from me.

/s/ *I find no other records of 211's sent please resubmit.*

2.) Identify claim numbers that were assigned to these Forms 211.

3.) Status update of the outstanding Forms 211 (i.e., excluding claim #2950006).

If you have any questions or need any additional information, please give me a call.

[Thank you for your attention to this!]

Best Regards,

/s/ Whit Tindall
Whit Tindall

[Received stamps with dates]

IRS, resubmittal of Forms 211, 2.6.06.doc
02/06/06
Page 1 of 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1056 **September Term, 2023**

USTC-5903-19W

Filed On: December 21, 2023

In re: Sealed Case,

BEFORE: Srinivasan, Chief Judge, and Henderson*, Millet, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

---

* Circuit Judge Henderson did not participate in this matter.

RULE 14(F) – STATUTORY PROVISIONS

26 U.S.C. §7623(a):

(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.

26 U.S.C. §7623(b):

(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.