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Appendix A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 14, 2022 Decided May 26, 2023

No. 21-1268

MICHAEL LISSACK,
APPELLANT

V.

COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

On Appeal from a Decision of
the United States Tax Court

Erica L. Brady-Gitlin argued the cause for appellant. With her on the briefs were *Gregory S. Lynam* and *Scott A. Knott*.

Brian C. Wille and *Usman Mohammad* were on the brief for *amicus curiae* Whistleblower 1109-13W in support of appellant.

Dean Zerbe and *Stephen M. Kohn* were on the brief for *amicus curiae* National Whistleblower Center in support of appellant.

Julie Ciamporcero Avetta, Attorney, U.S. Department of Justice, argued the cause for appellee. With her on the brief was *Bruce R. Ellisen*, Attorney.

Before: PILLARD and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: Section 7623 of the Internal Revenue Code authorizes the IRS to pay awards to whistleblowers who identify underpayment of taxes or violations of internal revenue law. The provision at issue here, subsection 7623(b)(1), mandates awards for whistleblowers who provide the IRS with information that makes a substantial contribution to a tax adjustment. It calls for awards of between 15 and 30 percent of proceeds the IRS collects "as a result of" an "administrative or judicial action" that is "based on information" provided by a whistleblower. I.R.C. § 7623(b)(1). The IRS's "determination of the amount of such award" depends on the extent to which a whistleblower "substantially contributed" to the administrative action. *Id.* A Treasury regulation interpreting the statute allows the IRS to treat investigations into unrelated tax issues of the same taxpayers as separate "administrative action[s]." 26 C.F.R. § 301.7623-2(a)(2), (b)(2) (Example 2). Appellant Michael Lissack claims the IRS owes him a whistleblower award under subsection 7623(b)(1), and he argues that the

Treasury regulation on which the IRS relied to decide otherwise contravenes the text of the statute.

Lissack submitted information to the IRS that he thought showed that a condominium development group evaded taxes through its treatment of golf-club-membership deposits. The IRS deemed the information Lissack submitted sufficiently specific and credible to warrant opening an examination, but later concluded that the membership deposits were correctly reported. Through its own further investigation, however, the IRS discovered an unrelated problem: The same development group had taken an impermissible deduction on intercompany bad debt. The IRS eventually ordered the development group to pay a large adjustment relating to its treatment of that debt, but it denied Lissack's claim for a percentage of those proceeds. When Lissack sought review of that decision, the Tax Court granted summary judgment to the IRS. Lissack appeals to us, and the IRS primarily argues that the Tax Court lacked jurisdiction to review its award denial, even as it defends its rule and its application to Lissack's case.

We hold that the Tax Court had jurisdiction and that the challenged provisions of the rule are consistent with the tax whistleblower statute. Because the IRS Whistleblower Office's denial of an award to Lissack rests on a reasonable application of a valid rule to the facts reflected in the administrative record, we affirm.

BACKGROUND

A.

The Internal Revenue Service (IRS or Service) has authority under Internal Revenue Code Section 7623 to pay awards to whistleblowers who help the Service identify and collect underpaid taxes. Congress first granted that authority to the Secretary of the Treasury in 1867. Act of March 2, 1867, Pub. L. No. 39-169, § 7, 14 Stat. 471, 473. Until 2006, any such whistleblower award was at the discretion of the IRS. *See* Taxpayer Bill of Rights 2, Pub. L. 104-168, § 1209, 110 Stat. 1452, 1473 (1996); *Whistleblower 14106-10W v. Comm'r*, 137 T.C. 183, 186 (2011). Under the discretionary regime, the Service was not bound by the statute or regulations to pay any whistleblowers and, when it chose to do so, the amount was within its sole discretion; there was no provision for judicial review.

In 2006, Congress amended the tax whistleblower statute. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958-60 (2006 Act). The amendment added subsection (b) to make some whistleblower awards mandatory, *id.*; I.R.C. § 7623(b), even as it retained in subsection (a) the IRS's longstanding authority to make discretionary awards to people who help in "detecting underpayments of tax," or "detecting and bringing to trial and punishment" persons who violate internal revenue laws, I.R.C. § 7623(a). The 2006 Act also created the IRS Whistleblower Office, empowered it to determine award amounts, and established a right to appeal any Whistleblower Office award "determination" to the Tax Court. § 406, 120 Stat. at 2958-60; I.R.C. § 7623(b)(4). This appeal turns on the

meaning of the mandatory-award provision (subsection (b)(1)) and the judicial-review provision (subsection (b)(4)).

Under the mandatory-award provision, a whistleblower "shall . . . receive" an award if the IRS "proceeds with any administrative or judicial action described in subsection (a)"— *i.e.*, detecting underpayments or detecting and bringing evaders to judgment—"based on information brought to the Secretary's attention by" the whistleblower. I.R.C. § 7623(b)(1). (For convenience in this appeal, which involves only administrative action against a taxpayer, we use the shorthand "administrative action" rather than "administrative . . . action," and "proceeds based on," rather than "proceeds . . . based on," when quoting subsection 7623(b)(1).) A mandatory award under subsection (b)(1) must be 15 to 30 percent "of the proceeds collected as a result of the action (including any related actions)," or from a settlement. *Id.* Within that range, the amount of a mandatory award "shall depend upon the extent to which the individual substantially contributed to such action." *Id.*

The judicial-review provision states: "Any determination regarding an award under paragraph [(b)](1) . . . 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)." *Id.* § 7623(b)(4). We recently held that a reviewable "determination regarding an award" within the meaning of that section, *id.*, does not include the Whistleblower Office's "threshold rejection" of a whistleblower's submission "for vague and speculative

information" in advance of any referral to the IRS for examination, *Li v. Comm'r*, 22 F.4th 1014, 1017 (D.C. Cir. 2022). In this appeal, the IRS argues that the Tax Court lacked jurisdiction because, in its view, the logic of *Li* means the letter denying Lissack's claim also was not a reviewable determination under subsection (b)(4).

B.

Lissack challenges three parts of a Treasury Department regulation we refer to as the Whistleblower Definitions Rule: (1) the definition of "administrative action," (2) one of the examples illustrating what counts as the Service "proceed[ing]" with an administrative action "based on" whistleblower information, and (3) the definition of "related action." 26 C.F.R. § 301.7623-2(a)(2), (b)(2) (Example 2), (c)(1).

Recall that an award is mandatory under the statute if the IRS "proceeds with any administrative or judicial action" that is "based on" the whistleblower's information. I.R.C. § 7623(b)(1). The Rule defines "administrative action" to mean "all or *a portion of* an Internal Revenue Service (IRS) civil or criminal proceeding against any person that may result in collected proceeds, . . . including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation." 26 C.F.R. § 301.7623-2(a)(2) (emphasis added). That definition allows the IRS to divide examinations into discrete segments raising distinct tax issues, and to treat each as a separate administrative action.

In defining how the Service "proceeds" with an action "based on" whistleblower information, I.R.C. § 7623(b)(1), the Rule distinguishes IRS administrative actions subject to the mandatory-award provision from those not triggering such awards: The IRS "proceeds based on information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower." 26 C.F.R. § 301.7623-2(b)(1). When the IRS "initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided," it "proceeds based on" the whistleblower submission. *Id.*

The regulatory definitions of "administrative action" and "proceeds based on" work together. These provisions allow the IRS to consider investigations into tax issues unrelated to the whistleblower submission as separate administrative actions. The upshot is that a whistleblower whose information may have "substantially contributed" to a fruitless action against a person is not entitled to share proceeds from a distinct action against that same person that did not draw on the whistleblower's information. As the agency explained in the preamble to the final regulations, "the tax administration process is a long and multi-faceted one that may extend over the course of many years and may involve multiple substantial contributions from different sources." Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 79 Fed. Reg. 47,246, 47,262/3 (Aug. 12, 2014) (codified

at 26 C.F.R. pt. 301). In cases involving multiple tax issues, treating each distinct tax issue as a separate "administrative action" enables the IRS to calibrate whether and to what extent a recovery was "based on" a whistleblower's tip "by reference to just the discrete and relevant portion of the examination to which the information provided relates." *Id*. at 47,250/3.

The Whistleblower Definitions Rule includes some examples illustrating rule applications. The challenged Example Two to the definition of "proceeds based on" describes cases in which the IRS's investigation of a whistleblower submission uncovers "additional facts that are unrelated to the activities described in the information provided by the whistleblower," leading the Service to examine issues other than those the whistleblower identified. 26 C.F.R. § 301.7623-2(b)(2) (Example 2). In those circumstances, the Rule explains, "[t]he portions of the IRS's examination . . . relating to the additional facts obtained" through the Service's independent investigative measures "are not actions with which the IRS proceeds *based on* the information provided by the whistleblower because the information provided did not substantially contribute to the action." *Id*. (emphasis added).

The Whistleblower Definitions Rule also interprets the statutory term "related actions." I.R.C. § 7623(b)(1). Recall that the mandatory-award provision of the tax whistleblower statute states that a whistleblower shall receive a percentage of "the proceeds collected as a result of the action (including

any related actions)." *Id.* (emphasis added). Under the Whistleblower Definitions Rule, "the term related action means an action against a person other than the person(s) identified in the information provided and subject to the original action(s)," so long as the action against the additional person has a regulatorily specified nexus to the original action. 26 C.F.R. § 301.7623-2(c)(1). That definition does not treat action on a distinct issue as "related" to action on a whistleblower's information just because it involves the same taxpayer, even if the IRS discovered the issue only because the whistleblower led it to audit that taxpayer.

C.

In 2009, Michael Lissack filed with the IRS Whistleblower Office an Application for Award for Original Information (Form 211). He submitted almost 200 pages of material identifying a condominium development group and showing why he thought it had underpaid its taxes on golf club memberships. Lissack contended that, after making membership deposits nonrefundable in 2008, the development group should have reported the retained deposits to the IRS as gross income.

Lissack's information led to an IRS examination into the development group. A senior tax analyst in the Whistleblower Office determined that Lissack's submission identified a tax issue and referred it to the IRS Large Business and International Division. A revenue agent in that division opened an investigation into Lissack's information and sent progress reports to the

Whistleblower Office. In a 2011 report, the revenue agent explained that, before receiving Lissack's submission, the IRS had not planned to investigate the development group, but the information Lissack provided "was sufficient to warrant beginning of examination." *Lissack v. Comm'r*, 157 T.C. 63, 66 (2021). In other words, the revenue agent acknowledged that Lissack's submission was the reason the IRS opened an examination. The following month, the revenue agent reported that he had fully researched the membership-deposit tax issue and concluded that the development group reported the deposits correctly. The agent further reported that, during his investigation, he discovered a different tax issue that was "unrelated to the subject of the whistleblower claims": a $60 million deduction that the development group took for "bad debt," meaning a business debt that the company characterized as worthless and deducted from gross income. *Id.*; *Topic No. 453, Bad Debt Deduction*, IRS, https://perma.cc/VN67-LGGF (last updated Apr. 27, 2023). In 2013, the revenue agent finished the examination and ordered several tax adjustments, the largest of which was for the $60 million bad-debt deduction. The agent reported that Lissack did not "provide[] *any* information for the adjusted issues." *Lissack*, 157 T.C. at 66; *see* J.A. 59 (Declaration of Whistleblower Office Analyst).

In 2017, the Whistleblower Office denied Lissack's claim for an award. In the final determination letter, the Whistleblower Office informed Lissack that his claim was denied "because the IRS took no action on the issues you raised." J.A.

16. "After receipt of your information," the letter explained, "the IRS initiated an examination" of the development group, "and the IRS reviewed the information you provided as part of that examination. However, that review did not result in the assessment of additional tax, penalties, interest or additional amounts with respect to the issues you raised." J.A. 16. Finally, the letter informed Lissack that the IRS did assess additional taxes against the taxpayer, "but the information you provided was not relevant to those issues." J.A. 16.

Lissack petitioned the Tax Court to review the Whistleblower Office's adverse decision on his application for an award. The IRS moved for summary judgment based on the relevant portion of the administrative record and a declaration from the Whistleblower Office analyst assigned to Lissack's claim. Lissack filed a cross-motion for partial summary judgment, arguing the Service misapplied its own rule and challenging certain provisions of the Whistleblower Definitions Rule as contrary to the statute. In his opposition to the IRS's summary judgment motion, Lissack argued that the administrative record was incomplete because the IRS had redacted too many documents in the administrative file.

In the decision now under review, the Tax Court granted summary judgment in full in favor of the IRS. In a carefully reasoned opinion, the Tax Court held that, although the IRS "did initiate an action" based on the information Lissack provided regarding membership deposits, he "is not eligible for

a whistleblower award" because "the IRS did not collect any proceeds 'as a result of th[is] action'" or any "related action." *Lissack*, 157 T.C. at 69-70 (alteration in original) (quoting I.R.C. § 7623(b)(1)), 72, 76. The undisputed facts showed that Lissack "supplied no information to the IRS about [the development group's] intercompany bad debt deduction," so he was not entitled to a percentage of the proceeds collected in that action. *Id.* at 71.

In granting summary judgment, the Tax Court had "no difficulty concluding that the regulation passes muster" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Lissack*, 157 T.C. at 74. The court noted that the statute "does not describe or define an 'administrative or judicial action'" so, as relevant here, "leaves ample scope to the Secretary to define the term" to refer to "'all or a portion of' an IRS civil or criminal proceeding." *Id.* at 72 (quoting 26 C.F.R. § 301.7623-2(a)(2)). In other words, it saw the statutory language as ambiguous as to whether an expanded portion of an examination is a separate administrative action and as to what kinds of whistleblower contributions require an award. Given that ambiguity, the Tax Court held, the Whistleblower Definitions Rule reasonably interprets the statutory terms "administrative action" and "proceeds based on." *Id.* at 75-76.

The Tax Court also rejected Lissack's remaining two arguments. First, the court held that the investigation into the bad debt was not a "related action," under the IRS's definition of that term, to the

action on the membership-deposit issue Lissack identified. *Id.* at 76 (citing 26 C.F.R. § 301.7623-2(c)(1)). It was neither "against a person other than the person(s)" Lissack's information identified, nor were "[t]he facts relating to" the bad-debt action "substantially the same" as the membership-deposit facts Lissack provided. *Id.* (alteration in original) (quoting 26 C.F.R. § 301.7623-2(c)(1)). Second, the court held that the administrative record sufficed, providing "more than enough evidence to confirm that petitioner is not eligible for a mandatory award." *Id.* at 78. The Tax Court noted that this is a "record rule" case in which summary judgment ordinarily is decided based on an administrative record that "comprises all information contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges." *Id.* at 77 (first quoting *Van Bemmelen v. Comm'r*, 155 T.C. 64, 79 (2020); and then quoting 26 C.F.R. § 301.7623-3(e)(1)). Although whistleblowers may file motions to compel production of documents and to supplement the record, the Tax Court noted, Lissack "filed no motion of either sort." *Id.* at 78.

Lissack moved to vacate or revise the summary judgment decision, and for reconsideration, but the Tax Court denied reconsideration. This appeal of the Tax Court decisions followed.

DISCUSSION

The IRS argues that the Tax Court lacked jurisdiction over Lissack's appeal, and in any event reached the correct result. Lissack counters that the

Tax Court correctly exercised jurisdiction but erred in granting summary judgment to the IRS because the Whistleblower Definitions Rule conflicts with the statute, a genuine factual dispute remains over whether the revenue agent relied on Lissack's submission, and the administrative record was incomplete without the entire examination file. We hold that the Tax Court had jurisdiction, the Rule is consistent with the statute, and the Tax Court correctly decided summary judgment on a sufficient administrative record that Lissack never sought to supplement.

A. The Tax Court had jurisdiction.

"Any determination regarding an award under" subsection 7623(b)(1), (2), or (3), may be appealed to the Tax Court, which "shall have jurisdiction with respect to such matter." I.R.C. § 7623(b)(4). Our jurisdiction over the merits of Lissack's appeal, in turn, rests on the Tax Court having had jurisdiction. *Li*, 22 F.4th at 1015. We consider the jurisdictional question *de novo*, *Myers v. Comm'r*, 928 F.3d 1025, 1031 (D.C. Cir. 2019), and hold that the Tax Court had jurisdiction over Lissack's petition.

By its plain terms, subsection (b)(4)'s jurisdictional grant applies to "*[a]ny* determination regarding an award." I.R.C. § 7623(b)(4) (emphasis added). The Supreme Court has "repeatedly explained" that "the word 'any' has an expansive meaning." *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022) (quoting *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020)). "Similarly, the use of 'regarding' 'in a legal context generally has a broadening effect, ensuring

that the scope of a provision covers not only its subject but also matters relating to that subject.'" *Id.* (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018)). Congress thereby made generous provision for judicial review of Whistleblower Office award decisions.

The Service challenges the Tax Court's jurisdiction based on *Li v. Commissioner*, 22 F.4th 1014. We held in *Li* that a threshold rejection of a Form 211 (*i.e.*, an application for a mandatory award) was not a reviewable "award determination under subsection (b)(1)-(3)." *Id.* at 1016; *see id.* at 1017-18. The Whistleblower Office had concluded that Li's Form 211 provided only "vague and speculative information it could not corroborate, even after examining supplemental material Li herself did not provide," so the Office did not even forward Li's submission to an IRS examiner. *Id.* at 1017. We referred to the text of subsection (b)(1) to reason that a "threshold rejection of a Form 211 by nature means the IRS is not *proceeding* with an action against the target taxpayer," and that "[t]herefore, there is no award determination, negative or otherwise, and no jurisdiction for the Tax Court." *Id.* We expressly reserved in *Li* the question of jurisdiction in cases in which the Whistleblower Office "wrongly denied a Form 211 application" but the IRS "nevertheless proceeded against a target taxpayer based on the provided information." *Id.* at 1017 n.2.

The Service contends that our logic in *Li*—looking to when the IRS "proceeds with" an action *per* subsection (b)(1) as describing a jurisdictional

prerequisite—compels us to likewise treat as jurisdictional a second requirement of subsection (b)(1): that the IRS have "collected proceeds" based on the whistleblower's information. IRS Br. 25. Because, in the Service's view of the merits, the proceeds it collected were not recovered in the administrative action it took in response to Lissack's submission, it asserts the Tax Court lacked jurisdiction under subsection (b)(4) as interpreted in *Li*. In other words, as the IRS reads it, our decision in *Li* renders the jurisdictional grant coextensive with the merits of a whistleblower appeal. We disagree.

The fact that the IRS conducted an examination here suffices to distinguish Lissack's case from *Li*. Li never claimed that the IRS proceeded with any administrative or judicial action against the target taxpayer based on her submission. *Li*, 22 F.4th at 1017 n.2. Here, by contrast, there is no dispute that the Whistleblower Office referred Lissack's submission to the IRS, and an IRS revenue agent initiated an examination of the membership-deposits issue that Lissack identified. That referral and examination count as the IRS "proceed[ing] with" an "administrative action" that was "based on" the information Lissack brought to the Secretary's attention. I.R.C. § 7623(b)(1). And the "determination regarding an award" was the Whistleblower Office letter to Lissack informing him that the examination it initiated based on the information he provided did not result in the collection of any proceeds, so he was not entitled to an award.

In sum, contrary to the Service's position, the

statute does not require a whistleblower to establish a meritorious claim to an award before the Tax Court may exercise jurisdiction to review the IRS's determination on that claim. An "unusually high degree of clarity" is required to treat statutory requirements as jurisdictional, *Myers*, 928 F.3d at 1035, and, as just explained, subsection (b)(4) does not clearly support the Service's reading. To hold otherwise would impute to Congress an intent to authorize appeals by whistleblowers who believe their awards are too low, but bar appeals by whistleblowers like Lissack who receive no award at all. To be sure, unless the IRS has made some adjustment, it is unclear what relief a whistleblower could be seeking. But the Whistleblower Office in this case made substantial adjustments. The merits dispute is whether Lissack's concededly nonfrivolous submission entitles him to share in the IRS's recovery from the taxpayer he identified. We need not delineate the precise line between an unreviewable threshold rejection and a reviewable determination to conclude that the decision here was a "determination regarding an award" under subsection (b)(4).

Consistent with the plain terms and structure of the statute and our decision in *Li*, the Tax Court had jurisdiction over Lissack's appeal.

B. The challenged regulations are consistent with the tax whistleblower statute.

Lissack challenges three provisions of the Whistleblower Definitions Rule. As a general matter, we review the decisions of the Tax Court "in the same manner and to the same extent as decisions of the

district courts in civil actions tried without a jury." I.R.C. § 7482(a)(1). The Tax Court treated the relevant portion of the statute as ambiguous and upheld the IRS interpretation as reasonable under *Chevron*. On appeal, both parties likewise argue within the *Chevron* framework. The IRS defends the Tax Court's conclusion that the Whistleblower Definitions Rule reasonably construes ambiguous statutory text. And Lissack objects that subsection 7623(b) unambiguously supports his competing construction. We review the Tax Court's legal rulings *de novo*. *Byers v. Comm'r*, 740 F.3d 668, 675 (D.C. Cir. 2014). At the first step of *Chevron*, "we must . . . decide 'whether Congress has directly spoken to the precise question at issue.'" *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1047 (D.C. Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). If we can discern it from the statute, we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If the statute is "silent or ambiguous with respect to the specific issue," we do not simply impose our own interpretation, "as would be necessary in the absence of an administrative interpretation," *id.*, but move to the second step and "determine whether [the IRS's] interpretation is 'based on a permissible construction of the statute.'" *Clean Air Project*, 891 F.3d at 1047 (quoting *Chevron*, 467 U.S. at 843). We hold that the Whistleblower Definitions Rule reasonably interprets the statute's mandatory-award provision.

1.

Lissack argues that, under the plain language of

the statute, he is entitled to a whistleblower award because the IRS would not have opened an examination into the condominium group's tax problems but for his submission. He challenges the regulatory provisions that control the IRS's determinations whether any proceeds were "collected as a result of" an IRS "administrative action" to which a whistleblower "substantially contributed." I.R.C. § 7623(b)(1). First, he challenges the provision of the Rule defining an "administrative action" that the IRS treats as "based on" a whistleblower submission under subsection (b)(1) to be "all or a portion of" a proceeding that may yield collected proceeds. 26 C.F.R. § 301.7623-2(a)(2). Second, he challenges an example (Example Two) that illustrates how, when the IRS discovers "additional facts that are unrelated to the activities described in the information provided by the whistleblower" and accordingly expands the scope of the examination, the investigation into those unrelated facts "are not actions with which the IRS proceeds based on the information provided by the whistleblower." 26 C.F.R. § 301.7623-2(b)(2) (Example 2).

Lissack's challenge requires us to answer two questions: First, whether the tax whistleblower statute requires the IRS to consider the "whole action"—in this case, all its examination activity—regarding one taxpayer as a single administrative action, and, second, whether the statute mandates an award whenever the whistleblower's information was the but-for cause to initiate an investigation of the taxpayer, even if the ultimate basis for the IRS's collection of proceeds found no factual support in the information the whistleblower provided.

We hold that the IRS definition of "administrative action" and Example Two are permissible interpretations of Section 7623. The tax whistleblower statute does not conclusively answer whether examinations into distinct tax issues not identified in a whistleblower's submission can be separate administrative actions. Nor does the statute unambiguously require that a whistleblower receive a mandatory award where the whistleblower's information was unrelated to the tax issues on which the IRS ultimately collected proceeds, even if that information was the but-for cause of an examination.

"We begin, as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 283 (2011). Subsection (b) of Section 7623, the mandatory-award provision, requires the Secretary to pay awards of 15 to 30 percent "of the proceeds collected as a result of the action (including any related actions)" whenever 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." I.R.C. § 7623(b)(1). The cross reference to subsection (a) tells us that the "administrative action[s]" subject to mandatory whistleblower awards are actions for "detecting underpayments of tax" or "detecting and bringing to trial" persons who violate or "conniv[e]" to violate internal revenue laws. *Id.* § 7623(a).

The statute does not further define "administrative action," so we look to the ordinary meaning of the phrase. *See CSX Transp., Inc.*, 562

U.S. at 284. "Administrative" describes "administration," meaning "[t]he executive branch of a government." WEBSTER'S II DICTIONARY 11 (3d ed. 2005). "Action" is "[a]n act or deed." *Id.* at 9; *see also Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[t]he process of doing something; conduct or behavior"). The phrase "administrative action," then, generally refers to acts of executive agencies.

Two other phrases from subsection (b)(1) help inform the scope of "administrative action" as the term is used here: "based on" and "substantially contributed." I.R.C. § 7623(b)(1). The IRS must pay an award only where it "proceeds based on" information that a whistleblower provides. *Id.* The statute does not define or explain what level of causation "based on" implies. Lissack argues it is necessarily met by but-for causation, requiring an award whenever the whistleblower's information appears within the causal chain leading the IRS to recover proceeds from a delinquent taxpayer. But the Whistleblower Definitions Rule defines when the Service "proceeds based on" whistleblower information as limited to cases in which "the information provided substantially contributes to an action against a person identified by the whistleblower." 26 C.F.R. § 301.7623- 2(b)(1).

The IRS's reading of "proceeds based on" gains support from the statutory requirement that the whistleblower information have "substantially contributed" to a recovery. I.R.C. § 7623(b)(1). The statute says that the size of a mandatory award within the stated range "shall depend upon the extent

to which the individual substantially contributed to such action." *Id.* In pegging the award amount to the degree of substantiality of the whistleblower's assistance, the statute plainly means that all such awards depend on the whistleblower having contributed in some substantial degree to the Service's ability to proceed.

Lissack also rests on what he claims is relevant past practice of the IRS of treating an examination as a single administrative action. He says that when Congress amended the statute in 2006 to add mandatory whistleblower awards, it intended to incorporate the IRS's then-existing practice. Pointing to a committee staff summary of the 2006 amendments, Lissack contends it shows the IRS had no prior practice of identifying distinct administrative actions within a larger examination. Lissack's past-practice argument misses the mark. Before 2006, whistleblower awards were entirely at the discretion of the IRS, § 1209, 110 Stat. at 1473, so the statute did not specify how the Service might parse the roles of whistleblower submissions in its proceedings. We are unpersuaded that the Service's practice under the discretionary regime informs wholly new requirements under mandatory-award provisions of the 2006 Act.

In sum, Lissack "fails to show that the language of [Section 7623 of the Internal Revenue Code] unambiguously compels" his interpretation. *Otsuka Pharm. Co. v. Price*, 869 F.3d 987, 993 (D.C. Cir. 2017). The statute does not clearly direct the IRS to treat an entire examination as a single administrative

action and to give an award to a whistleblower whose submission was a but-for cause of the examination.

We turn, therefore, to the second step of our *Chevron* analysis, deferring to the agency's interpretation "as long as it is consistent with the statutory terms and is reasonable." *Id.* We hold that the Whistleblower Definitions Rule reasonably interprets the tax whistleblower statute. The ordinary meaning of "administrative action"—activities by executive agencies— may in this context sensibly be limited to action on the discrete tax issue or issues the whistleblower's information identifies. As already discussed, Congress required awards only where the IRS "proceeds based on" the whistleblower information and makes a recovery, with precise award amounts within the stated range depending on the degree to which the information "substantially contributed to" that recovery. The Whistleblower Definitions Rule validly interprets the statute to require awards only to whistleblowers who identify underpayments and provide information that advances to some substantial degree the IRS's recovery of those underpayments.

Lissack defends his but-for approach, arguing that he provided "valuable information" by informing the IRS that the development group taxpayers "are the type of taxpayers to misstate their tax liability generally, and debt in particular." Appellant's Br. 10. But there is "no statutory requirement that [the IRS] follow such an approach." *Clean Air Project*, 891 F.3d at 1051. Rather, there is ample reason to doubt that Congress meant to entitle whistleblowers to

substantial awards just for raising plausible but meritless concerns about taxpayers who, on investigation by the IRS, turn out to be noncompliant in some other, unrelated way. Such a regime likely would encourage whistleblowers to flyspeck major taxpayers, identifying any plausible underpayment in the hope of triggering an examination yielding some other, major adjustment. The IRS approach, in contrast, calibrates mandatory awards to the fruits of the particular IRS actions that the whistleblower's information substantially assists.

Congress directed the IRS to reward whistleblowers based on the extent of their substantial contributions to recovery of unpaid taxes. The challenged provisions of the Whistleblower Definitions Rule measure contributions according to the degree to which the whistleblower's specific facts aid the relevant portion of an examination. Those provisions reasonably interpret the tax whistleblower statute.

2.

Lissack also argues that the IRS's definition of "related action," 26 C.F.R. § 301.7623-2(c), impermissibly narrows the statute's reach. Even if the "administrative action" definition and Example Two are valid and the bad-debt investigation was a separate action not based on his submission, Lissack contends it should count as a "related action," entitling him to a share of its proceeds. He challenges the "related action" definition under *Chevron* step one and makes no step two argument on this point.

Under the mandatory-award provision, the IRS must pay whistleblowers awards amounting to 15 to 30 percent "of the proceeds collected as a result of the action (including any *related actions*)." I.R.C. § 7623(b)(1) (emphasis added). Section 7623 does not elaborate on the meaning of "related actions." The challenged rule defines a "related action" as "an action against a person other than the person(s) identified in the information provided and subject to the original action(s)" where three conditions are met: (1) the action involves "substantially the same" facts as the whistleblower submission, (2) "[t]he IRS proceeds with the action against the other person based on the specific facts described and documented" in the submission, and (3) "the IRS can identify the unidentified person using the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information)." 26 C.F.R. § 301.7623-2(c). The Rule's "related action" definition thus unites actions that involve "substantially the same" facts so as to reward whistleblowers whose submissions enable the IRS, without further investigation, to identify additional noncompliant taxpayers. That approach is consistent with the statute, which directs the IRS to grant awards according to the substantiality of the whistleblower's contribution. *See* I.R.C. § 7623(b)(1).

In Lissack's view, the plain meaning of the statutory reference to "related actions" also includes actions that are against the same taxpayer but involve taxpayer activities different from those identified in the whistleblower's submission. Lissack invokes

ordinary meanings of "related" as "belonging to the same family, group, or type; connected," Appellant's Br. 35 (quoting an unidentified edition of the Oxford English Dictionary), and he asserts that the IRS investigation of the condominium development group's bad debt was necessarily "related" to the membership-deposits problem his submission identified. But even if we accept his definition of "related," that definition does not compel Lissack's reading of the statute. An action could be "connected" to the original action if it involved the same facts, as the IRS contends, or if it involved the same taxpayer, as Lissack contends. Lissack's dictionary definition of "related" does not foreclose the IRS's interpretation.

Lissack further argues that Congress would have chosen a narrower term than "related" had it intended the IRS's reading. Because "Congress never limited related actions to actions relating to another taxpayer, which it easily could have," Lissack says, the IRS should not be able to include that limitation in its definition. *Id.* at 36. But the mere possibility that the statute could have been worded even more clearly does not defeat the IRS's reading.

Lissack also seeks support in the treatment of "related actions" under the False Claims Act, but that analogy is unhelpful. "Actions are 'related'" under the False Claims Act "if they assert the 'same material elements of fraud' as an earlier suit, even if the allegations 'incorporate somewhat different details.'" *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 116 (D.C. Cir. 2015) (quoting *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318

F.3d 214, 217 (D.C. Cir. 2003)). The Tax Court held the False Claims Act definition "has no application to a tax case such as this," and that its definition was in any event unmet here, where "the IRS did not just pursue 'a different legal theory' for the membership deposits issue," but proceeded on "an entirely unrelated issue—the bad debt deduction—that was governed by different law and different facts." *Lissack*, 157 T.C. at 77. We agree that, even if the False Claims Act standard applied, Lissack's submission about the membership-deposits issue did not relate to the bad-debt issue in a way that would meet that standard.

Lissack has not established that the statute forecloses the Rule defining "related action," and he does not contend that the definition is unreasonable or otherwise contrary to the APA.

C. The Tax Court had no obligation to conduct a trial *de novo*.

In challenging the Tax Court's affirmance of the Whistleblower Office determination denying him an award under I.R.C. § 7623(b)(1), Lissack argues that summary judgment is foreclosed here by a genuine factual dispute over whether the revenue agent relied on Lissack's submission to identify the bad-debt issue. He contends that the Tax Court erroneously accepted an administrative record that was incomplete because it did not include the entire examination file.

The parties agree that we review legal rulings of the Tax Court *de novo*, including rulings on motions

for summary judgment, *Byers*, 740 F.3d at 675, but they dispute the correct standard of review in the Tax Court. Lissack argues that the Tax Court should review determinations of the Whistleblower Office "as it reviews cases under the Tax Court's original deficiency jurisdiction," Appellant's Br. 40—by "trial *de novo*," *Ax v. Comm'r*, 146 T.C. 153, 161 (2016)—instead of confining its review to the administrative record. Lissack critiques the Tax Court's decision in *Kasper v. Commissioner*, 150 T.C. 8 (2018), which held that the Tax Court reviews whistleblower award decisions under APA section 706(2)(A) based on the administrative record. *Id.* at 14-15, 20-22. Two *amici* join Lissack to argue that *de novo* factfinding by the Tax Court would better serve Congress's intent to establish meaningful review of Whistleblower Office decisions.

The IRS defends the standard of review established in *Kasper*. It also argues that we have no occasion here to reach the issue "because the denial of Lissack's claim was correct under any standard of review." IRS Br. 45. We agree that the Tax Court's decision is correct under any standard of review, so we have no occasion to pass on the merits of *Kasper*.

Lissack's appeal is comprised of legal questions, including (1) the validity of the Whistleblower Definitions Rule, (2) whether material disputes of fact preclude summary judgment, and (3) the adequacy of the record before the Tax Court.

First, in resolving Lissack's legal challenges to the IRS's interpretations of relevant statutory terms, the Tax Court and this court have each conducted

de novo review to identify statutory ambiguity and analyze the Whistleblower Definitions Rule under *Chevron*. *See supra* Discussion Parts A and B.

Second, the propriety of summary judgment is likewise a legal question considered *de novo*. Lissack asserts that the Tax Court should not have granted summary judgment because key record facts are disputed, but he fails to show that to be the case. A factual dispute is "material," precluding summary judgment, only "if its resolution 'might affect the outcome of the suit.'" *Trudel v. SunTrust Bank*, 924 F.3d 1281, 1285 (D.C. Cir. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The IRS *agrees* with Lissack's factual assertion that it would not have opened any examination of the condominium group if not for Lissack's Form 211. The problem for Lissack is that the but-for causal link he emphasizes is legally insufficient to support his claim.

We, like the Tax Court, recognize that the IRS would have made no tax adjustment on the bad debt if it had not opened an examination on Lissack's submission regarding the taxpayer's treatment of membership deposits. Cognizant of that fact, our *de novo* review of the summary judgment yields the same conclusion as the Tax Court's: Under the statute and Rule, the adjustment was not "a result of" the "administrative action" regarding membership deposits that the IRS undertook "based on" Lissack's information, or to which his information "substantially contributed." I.R.C. § 7623(b)(1). As we have already explained, *see supra* Discussion Part B, administrative actions on the membership-deposits

issue and the bad-debt issue are distinct and unrelated as a matter of law under the valid Whistleblower Definitions Rule. 26 C.F.R. § 301.7623-2(a)(2), (b)(1), (c)(1).

Lissack insists that discovery would have established that the revenue agent relied on his submission, but the facts he says he sought to uncover would establish nothing more than but-for causation. In other words, he argues he needs discovery to support an already-accepted factual premise: The examination triggered by Lissack's whistleblower submission led to the IRS's own investigation into the bad debt. He claims he should have been afforded discovery regarding "how the Revenue Agent discovered the other issues." Appellant's Br. 49. In Lissack's view, such information is material "to determine if the issues are 'related' and how helpful the whistleblower's information was to the Revenue Agent." *Id.* Had the administrative record included the "entire taxpayer audit file," Lissack contends, he could have shown that the revenue agent's discovery of the intercompany bad-debt issue relied on the membership-deposits information Lissack submitted. *Id.* at 54. Again, for the reasons already discussed, *see supra* Discussion Part B, none of those additional facts could support a judgment in his favor.

Third, Lissack argues that the record before the Tax Court was inadequate. *Amici* agree. They contend that the statute contemplates trial *de novo* in the Tax Court. They argue the text, context, and drafting history of the statute so require. Lissack and *amici* point out that confining judicial review to the

administrative record is anomalous here because the Whistleblower Office makes the records of its award determinations without adjudicatory procedures, public comment, or other opportunity for stakeholders—including the whistleblower—to be heard. *Amicus* Whistleblower 11099- 13W also contends that judicial deference to the Whistleblower Office is inappropriate because the Office's determinations involve no "technically complex issue within an agency's unique expertise," only the kind of matter "that courts are called upon to resolve every day." Amicus Whistleblower 11099-13W Br. 10-11.

We need not here decide whether the Tax Court must conduct a trial *de novo* on an appeal of a Whistleblower Office determination, nor what standard of review applies to a challenge to the scope of the record the IRS submitted to the Tax Court, because Lissack made no request before the Tax Court to expand the administrative record or create a new one. If Lissack believed the record was inadequate, he should have sought to compel production of documents to supplement the record, but he concedes he failed to do so. Reply Br. 25-27.

Lissack counters that he should not have had to do so, because he moved only for *partial* summary judgment on his legal challenge to the Whistleblower Definitions Rule, anticipating that "resolution of that issue would dictate whether [he] needed to get into a long discovery fight." *Id.* at 25. But, as the Tax Court explained when rejecting his motion for reconsideration, even after that court granted the IRS's cross-motion for summary judgment Lissack did not seek supplementation of the administrative

record, nor did he "identif[y] any gaps in the administrative record" (nor, for that matter, did he point to any information in his own whistleblower submission) that "was relevant to the bad debt deduction issue." J.A. 369. In view of Lissack's failure to preserve the point, we affirm the Tax Court's decision to base its review on the portions of the administrative record the IRS compiled and submitted as relevant.

As the Tax Court acknowledged, some whistleblower claims may require discovery and judicial factfinding. But even had he not forfeited the point, Lissack has not shown that he was deprived of any material evidence. Again, on Lissack's own account, the factual point he sought to bolster was but-for causation. But "[h]ow the revenue agent discovered" the intercompany bad-debt issue, Appellant's Br. 49, was both undisputed in his favor, and immaterial. Lissack does not assert that broader access to the IRS files would reveal that his own submission to the IRS contained information on the condominium group's treatment of intercompany bad debt. And, under the statute and Rule, that bad-debt issue remains unrelated to the membership-deposits issue he identified. We see no error in the Tax Court's rulings on Lissack's record-inadequacy claims.

In sum, the Tax Court correctly concluded that "the record provides more than enough evidence to confirm that petitioner is not eligible for a mandatory award," and ruled in favor of the IRS as a matter of law. *Lissack*, 157 T.C. at 78. The Tax Court credited information in the administrative record showing that

"none of the adjustments had anything to do with the membership deposits issue," including the revenue agent's report that Lissack "had not 'provided *any* information for the adjusted issues,'" and the Whistleblower Office analyst's confirmation that Lissack "had made no allegations and submitted no facts related to [the development group's] intercompany debt (or any other adjustment)." *Id.* at 66. Lissack failed to challenge before the Tax Court its reliance on the administrative record or object to the scope of that record, and even now he does not identify information he would have sought that could have created a material factual dispute precluding summary judgment.

* * *

For the foregoing reasons, we affirm the judgment of the Tax Court.

So ordered.

Appendix B

United States Tax Court
Washington, DC 20217

Michael Lissack, Petitioner	)	
v.	)	Docket No. 399-18W.
Commissioner of Internal Revenue, Respondent	)	

ORDER

On August 17, 2021, the Court issued its Opinion in this case. *See Lissack v. Commissioner*, 157 T.C. __ (slip op.) (Aug. 17, 2021). The Court entered decision the next day. On September 15, 2021, petitioner filed a Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 and a Motion to Vacate or Revise Pursuant to Rule 162. We will deny both Motions.

The decision to grant or deny a motion under Rule 161 or Rule 162 lies within the Court's discretion. *See Bedrosian v. Commissioner*, 144 T.C. 152, 156 (2015) (Rule 161); *Taylor v. Commissioner*, T.C. Memo. 2017-212 (Rule 162). Reconsideration is intended to correct substantial errors of fact or law and allow the introduction of newly discovered evidence that the moving party could not have introduced by the exercise of due diligence. *See Estate of Quick v. Commissioner*, 110 T.C. 440, 441 (1998). Reconsideration "is not the appropriate forum for rehashing previously rejected legal arguments." *Turner v. Commissioner*, 138 T.C. 306, 307-308 (2012)

(quoting *Estate of Quick*, 110 T.C. at 441- 442); *see also Knudson v. Commissioner*, 131 T.C. 185, 186 (2008).

In his Motions petitioner urges two grounds for reconsideration. He first contends (as he previously contended) that he is entitled to a mandatory whistleblower award under the plain language of I.R.C. section 7623(b)(1). Our Opinion comprehensively addressed and rejected this argument. *See Lissack*, 157 T.C. at __ (slip op. at 8-23). We accordingly will deny petitioner's Motions to the extent he is "rehashing previously rejected legal arguments." *See Estate of Quick*, 110 T.C. at 442. Petitioner contends that granting summary judgment for respondent was premature because petitioner might learn new facts through further discovery. Our Opinion rejected this argument. Petitioner was in possession of all information that he provided to the IRS. If any of this information was relevant to the bad debt deduction issue, we are confident that he would have supplied it to the Court. As it was, "petitioner did not supply any information about * * * [the] issue that generated an adjustment. * * * No amount of discovery will change this fact." *Lissack*, 157 T.C. at __ (slip op. at 25).

Petitioner asserts that "the Opinion did not draw inferences in the light most favorable to petitioner, nor did it even state the legal standard that applies in summary judgment proceedings." But as we explained in the Opinion, "whistleblower award cases are not reviewed under the typical summary judgment standard * * * because whistleblower cases are 'record rule' cases." *Lissack*, 157 T.C. at __ (slip op. at 24). Rather, we "confine ourselves to the

administrative record to decide whether there has been an abuse of discretion." *Ibid.* (quoting *Van Bemmelen v. Commissioner*, 155 T.C. 64, 79 (2020)).

In certain, narrowly-defined circumstances, the Court may direct supplementation of the administrative record. *See Van Bemmelen*, 155 T.C. at 76 (noting three exceptions that may justify supplementation) (quoting *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010)). Petitioner did not seek that remedy and has not identified any gaps in the administrative record that is before us. As we held in our Opinion, the administrative record "provides more than enough evidence to confirm that petitioner is not eligible for a mandatory award." *Lissack*, 157 T.C. at __ (slip op. at 25).

Upon due consideration, it is

ORDERED that petitioner's Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161, filed September 15, 2021, is denied. It is further

ORDERED that petitioner's Motion to Vacate or Revise Pursuant to Rule 162, filed September 15, 2021, is denied.

(Signed) Albert G. Lauber
Judge

Served 09/20/21

Appendix C

United States Tax Court
Washington, DC 20217

Michael Lissack,	)	
Petitioner	)	
v.	)	Docket No. 399-18W.
Commissioner of Internal Revenue,	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the Court's Opinion (157 T.C. No. 5) issued in the above-docketed case on August 17, 2021, it is

ORDERED that respondent's Motion for Summary Judgment, filed September 1, 2020, is granted. It is further

ORDERED that petitioner's Motion for Partial Summary Judgment, filed October 5, 2020, is denied. It is further

ORDERED AND DECIDED that respondent's determination that petitioner is not eligible for a whistleblower award, set forth in the determination letter issued to petitioner on December 7, 2017, is sustained.

(Signed) Albert G. Lauber
Judge

Entered and Served 08/18/21

Appendix D

157 T.C. No. 5

UNITED STATES TAX COURT

MICHAEL LISSACK,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 399-18W. Filed August 17, 2021.

P filed Form 211, Application for Award for Original Information, claiming that T had failed to report membership fees as gross income. R initiated an examination on the basis of P's claim. During the examination R determined that T had properly treated the membership fees as nontaxable deposits but also discovered an unrelated issue--that T may have claimed an erroneous deduction. R expanded the scope of the examination to include the latter issue and ultimately disallowed the deduction, yielding a $60 million adjustment. R subsequently denied P's whistleblower claim on the ground that he had not supplied any information about the erroneous deduction.

A whistleblower is eligible for an award only if R "proceeds with an[] administrative or judicial action * * * based on information" supplied by the whistleblower and collects proceeds "as a result of the action." I.R.C. sec. 7623(b)(1). The parties have filed cross-motions for summary judgment addressed to

the question whether P is entitled to an award under this standard.

Held: Although R proceeded with an administrative action, P is not eligible for a whistleblower award because R did not collect any proceeds "as a result of the action." *See* I.R.C. sec. 7623(b)(1). The examination of the erroneous deduction issue constitutes a separate administrative action that was not initiated on the basis of P's claim. *See* sec. 301.7623-2(a)(2), (b)(1) and (2), *Example (2)*, Proced. & Admin. Regs.

Held, *further*, the construction of I.R.C. sec. 7623(b)(1), as set forth in these regulations, is valid under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Scott A. Knott, *Erica L. Brady-Gitlin*, and *Gregory S. Lynam*, for petitioner.

Paul Colleran and *Tara P. Volungis*, for respondent.

OPINION

LAUBER, *Judge*: In 2009 petitioner filed a claim for a whistleblower award under section 7623.[1] He informed the Internal Revenue Service (IRS or respondent) that a group of entities had failed to include in gross income millions of dollars of membership fees. The IRS Whistleblower Office (Office) processed his claim and referred it to a revenue agent, who initiated an examination. The

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure

revenue agent determined that the entities had properly treated the membership fees as nontaxable deposits. But he separately discovered an unrelated issue--that the entities had claimed an erroneous deduction--and made a $60 million adjustment on that account. The Office denied petitioner's claim because the adjustment was unrelated to the information he had supplied.

Section 7623(b)(1) provides that a whistleblower is entitled to an award only if the IRS proceeds "based on" the information he supplied and collects proceeds "as a result of the action." The parties have filed cross-motions for summary judgment as to whether petitioner is entitled to an award under this standard. Concluding that respondent has the better argument, we will grant his motion for summary judgment and deny petitioner's.

Background

The following facts are derived from the parties' pleadings and motion papers, including a declaration that attached the administrative record. Petitioner resided in Massachusetts when he filed his petition. We have jurisdiction under section 7623(b)(4).

Petitioner filed a Form 211, Application for Award for Original Information, which the Office received on February 6, 2009. Petitioner identified an affiliated group of entities (Target) that developed condominiums and offered golf and beach club memberships to condominium residents. The residents paid substantial upfront membership fees, which Target treated as nontaxable deposits in the year received. Petitioner alleged that, in November

2008, Target changed its refund policy such that Target acquired "complete control over" the fees received that year. Petitioner asserted that Target was thus required to include the membership fees in gross income.

The Office assigned nine claim numbers to petitioner's case, evidently corresponding to the various entities comprising Target. The claim was referred to Nora Beardsley, the Office's senior tax analyst. Ms. Beardsley reviewed petitioner's claim and determined that it appeared to identify a discernible Federal tax issue.[2] *See* Internal Revenue Manual (IRM) pt. 25.2.2.12(1)(e) (Dec. 30, 2008). She accordingly forwarded the case to the IRS Large Business & International Division (LB&I), which examines "corporations and partnerships with assets greater than $10 million." *See* IRM pt. 1.1.24.1(2) (Sept. 24, 2020).

A revenue agent (RA) in LB&I reviewed petitioner's allegations by researching Target and analyzing the group's tax returns and IRS account transcripts. In July 2011 the RA initiated a Form 11369, Confidential Evaluation Report on Claim for Award. The RA noted that "no audit or investigation [had been] planned" by LB&I but that the "[i]nformation submitted by the whistleblower was sufficient to warrant beginning of examination."

After examining the facts and relevant law the RA concluded that Target "did not have unfettered

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[2] Ms. Beardsley initially informed petitioner that the Office was rejecting his claim because he submitted it before Target's tax returns for 2008 were due. Ms. Beardsley subsequently determined that this was not a valid reason for rejection and reopened the case.

right and dominion over the deposits" and thus "properly excluded the deposits from gross income in the year received." Finding that Target properly "deferred the recognition of the deposits," the RA "propose[d] no adjustment related to the membership deposits issue."

The RA returned Form 11369 to the Office on August 19, 2011. A few months later he prepared a report for the Office, stating that "the whistleblower claim was fully investigated" and "no change was proposed." But he indicated that he had identified another issue, namely a deduction in excess of $60 million that Target had claimed "for intercompany bad debt." *See* sec. 166. He stated that the bad debt issue would take some time to examine but that it was "unrelated to the subject of the whistleblower claims." Ms. Beardsley decided to keep the case open until the RA finished his further investigation.

In 2013 the RA completed his examination, and the IRS issued Target notices of proposed adjustment. The RA disallowed the $60 million bad debt deduction and made a number of other (relatively minor) adjustments, all for tax year 2009. These other adjustments affected four entities within Target and included such items as salaries and wages, taxes and licenses, and partnership losses.

The RA forwarded to Ms. Beardsley the entire case file, including the Forms 4549, Income Tax Examination Changes, and Forms 886-A, Explanation of Items, that had been issued to Target. These documents showed that none of the adjustments had anything to do with the membership deposits issue. When Ms. Beardsley asked the RA whether the "whistleblower submission contribute[d]

to any of the adjusted issues," he replied (with emphasis) that petitioner had not "provided *any* information for the adjusted issues." Ms. Beardsley reviewed petitioner's submissions and confirmed that he had made no allegations and submitted no facts related to Target's intercompany debt (or any other adjustment).

Ms. Beardsley accordingly recommended that the Office deny petitioner's claim for award. She explained that, although "there was an assessment for additional taxes," the information petitioner supplied "was not relevant to those issues." The Office agreed with Ms. Beardsley's recommendation and on December 7, 2017, issued a final determination letter denying petitioner's claim. The letter stated that the claim had been denied "because the IRS took no action on the issues you raised. * * * The IRS did assess additional tax, * * * but the information you provided was not relevant to those issues."

Petitioner timely petitioned this Court for review of the Office's determination. On September 1, 2020, respondent filed a motion for summary judgment. Petitioner timely responded to that motion and filed, on October 5, 2020, a cross-motion for partial summary judgment.

Discussion

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). Under Rule 121(b) we may grant summary judgment when there is no genuine

dispute as to any material fact and a decision may be rendered, as a matter of law. *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). However, this summary judgment standard "is not generally apt" when reviewing whistleblower award determinations because we "confine ourselves to the administrative record to decide whether there has been an abuse of discretion." *Van Bemmelen v. Commissioner*, 155 T.C. 64, 78 (2020). "In cases that are decided on the administrative record * * *, this Court ordinarily decides the issues raised by the parties by reviewing the administrative record using a summary adjudication procedure." *Rowen v. Commissioner*, 156 T.C. __, _____(slip op. at 9) (Mar. 30, 2021).

B. *Analysis*

Section 7623(a) authorizes the payment of sums necessary for "detecting underpayments of tax" or "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." Subsection (b)(1) provides for nondiscretionary (i.e., mandatory) awards of at least 15% and not more than 30% of the collected proceeds if all stated requirements are met. Under section 7623(b)(1), an award can be paid only if the IRS "proceeds with an[] administrative or judicial action * * * based on information brought to the Secretary's attention." The whistleblower is entitled to an award only if the IRS collects money "as a result of the action."[3] Sec. 7623(b)(1).

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[3] The original version of the statute contained a slightly different clause, providing that whistleblowers would receive a percentage

In 2014 the Department of the Treasury (Treasury) issued regulations interpreting section 7623(b). T.D. 9687, 2014-36 I.R.B. 486. These regulations define key terms used in the statute and supply examples showing how these definitions apply. *See* sec. 301.7623-2, Proced. & Admin. Regs. These regulations apply "to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of" that date. *Id.* para. (f). Petitioner's claim was "open" as of August 12, 2014.

Among the terms defined by the regulations is the verb phrase "proceeds based on." *Id.* para. (b). The IRS "proceeds based on" the whistleblower's information when his information "substantially contributes to an [administrative or judicial] action against a person identified by the whistleblower." *Id.* para. (b)(1). That is true when the IRS "initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided." *Ibid.* On the other hand the IRS does not "proceed based on" the whistleblower's information when it merely "analyzes the information provided or investigates a matter raised by the information provided." *Ibid.*

The regulation illustrates these principles with four Examples, one of which has particular relevance here. *See id.* para. (b)(2), *Example* (*2*). This Example

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of the collected proceeds "resulting from the action." *See* 26 U.S.C. sec. 7623(b)(1) (2012). Because these clauses have the same meaning, we will refer to the current version of the statute for convenience.

posits a whistleblower who provides facts detailing how a taxpayer underpaid tax in Year 1. The IRS initiates an examination, investigates those facts, then expands the examination to determine whether the taxpayer, by engaging in the same activities, also underpaid tax in Year 2. During the examination the IRS obtains, through information document requests (IDRs) and summonses, "additional facts that are unrelated to the activities described in the information provided by the whistleblower." *Ibid.* "Based on these additional facts," the IRS further expands the scope of the examination for Years 1 and 2. *Ibid.*

Example 2 concludes that the IRS "proceeds based on" the whistleblower's information by initiating the Year 1 examination and expanding it to include the same issue for Year 2. On the other hand, Example 2 concludes:

> The portions of the IRS's examination of the taxpayer in both Year 1 and Year 2 relating to the additional facts obtained through the issuance of IDRs and summonses are not actions with which the IRS proceeds based on the information provided by the whistleblower because the information provided did not substantially contribute to the action. [*Ibid.*]

In short, the regulation concludes that the portion of the examination that is unrelated to the facts and issue identified by the whistleblower is a separate "administrative action." *See id.* para. (a)(2) (defining "administrative action" as "all or a portion" of an IRS examination).

On his Form 211 petitioner claimed that Target received millions of dollars in membership fees during 2008 but did not include these amounts in gross income on the theory that they were nontaxable deposits. Petitioner contended that Target's theory was incorrect because of an asserted change in the relevant facts--specifically, an alleged revision to Target's refund policy for membership fees. The IRS initiated an examination, and respondent concedes that it would not have initiated the examination "but for the information provided." *See* sec. 301.7623-2(b)(1), Proced. & Admin. Regs. The examination of the membership deposits issue is thus an "administrative action" that was initiated on the basis of the information petitioner supplied. *See ibid.*

This "administrative action," however, resulted in no adjustments to income and no collected proceeds. Indeed, the RA concluded that Target had "properly excluded the deposits from gross income in the year received." Because the IRS did not collect any proceeds "as a result of th[is] action," *see* sec. 7623(b)(1), petitioner is not eligible for a whistleblower award.

During the course of the examination the RA discovered an entirely separate issue--a deduction that Target reported for intercompany bad debt. The RA was alerted to this issue, not by any information in petitioner's Form 211, but by the RA's independent review of Target's tax returns. The RA expanded the audit to include the bad debt issue on the basis of "additional facts that are unrelated to the activities described in the information provided by" petitioner. Sec. 301.7623-2(b)(2), *Example* (*2*), Proced. & Admin. Regs. This portion of the examination, therefore, was

"not [an] action[] with which the IRS proceed[ed] based on the information provided by the whistleblower." *Ibid. see Whistleblower One 10683-13W v. Commissioner*, 145 T.C. 204, 206 (2015) (stating that collection must be "attributable in some way to the information that * * * [the whistleblower] provided").

The administrative record shows that the Office did not abuse its discretion in denying petitioner's claim for award. Ms. Beardsley reviewed his allegations and forwarded his Form 211 to an RA in LB&I. The RA performed an examination of petitioner's claim and ultimately "propose[d] no adjustment related to the membership deposits issue." But he informed Ms. Beardsley that during the examination he discovered "issues unrelated to the whistleblower issue"--namely, that Target "took a deduction for intercompany bad debt." Ms. Beardsley decided to keep the case open while the RA examined the bad debt issue.

After completing his examination the RA sent Ms. Beardsley copies of the Forms 4549 and 886-A disallowing the $60 million bad debt deduction. These documents made clear that the deficiency determination did not arise from the membership deposits issue. Ms. Beardsley nevertheless took the extra step of asking the RA whether the "whistleblower submission contribute[d] to" the bad debt adjustment. The RA promptly responded, emphasizing that petitioner had not "provided *any* information for the adjusted issues." Ms. Beardsley again reviewed petitioner's submissions and confirmed that they contained no information related to the intercompany bad debt. On the basis of this

record we have no difficulty concluding that the Office did not abuse its discretion in denying petitioner's claim for an award.

C. *Petitioner's Arguments*

1. *Validity of the Regulation*

Petitioner supplied no information to the IRS about Target's intercompany bad debt deduction. But he urges that "Congress did not intend to limit awards directly to the issues that the whistleblower provided information on." Recognizing the impediments that the regulations impose to this argument, petitioner contends that the regulations are to that extent invalid.

In addressing petitioner's challenge we apply the familiar two-step test of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First we ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842; *see City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. "If the statute is silent or ambiguous with respect to the question at issue, step two of *Chevron* requires the court to give deference to the agency's construction, so long as it is permissible and not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Whirlpool Fin. Corp. & Consol. Subs. v. Commissioner*, 154 T.C. 142, 175 (2020) (quoting *Chevron*, 467 U.S. at 844).

a. *Chevron Step One*

Section 7623(b)(1) provides that, "[i]f 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," that individual will, subject to specified conditions, receive an award of 15% to 30% of the amount collected. Congress did not define the term "administrative or judicial action." And section 7623(b) does not otherwise demarcate the contours of an "action" in a case such as this, where the IRS examination expands to matters unrelated to the issue identified by the whistleblower and to the facts he supplied. Congress therefore did not speak directly to the question at hand.

Petitioner contends that the statute is unambiguous and that the challenged regulations are inconsistent with Congress' intent. He emphasizes the word "any" in the statute's opening clause, which asks whether the Secretary has proceeded with "any administrative or judicial action * * * based on information brought to the Secretary's attention by" the whistleblower. According to petitioner, "the statute does not require that the proceeds on which the award is determined flow directly from the whistleblower's information." If the IRS initiates "any" action, he contends, then that action in its entirety constitutes the "action" for purposes of section 7623. Here, the IRS did initiate an action, viz., an examination of Target. And petitioner contends that the IRS proceeded with this action "based on information" he provided, viz., his identification of Target as a possible audit candidate.

We disagree with petitioner's submission that the statute is unambiguous. Subsection (b)(1) refers to

any administrative or judicial action "described in sub- section (a)." Sec. 7623(b)(1). But subsection (a) does not describe or define an "administrative or judicial action." Subsection (a) does not even refer to that term. It speaks only of paying an award "from the proceeds of amounts collected by reason of the information provided." Sec. 7623(a) (flush language).

Subsection (b) thus refers to a description in subsection (a) that does not exist. And whereas subsection (b) initially refers to commencement of "any * * * action," it defines the allowable award by reference to proceeds collected "as a result of *the action*." Sec. 7623(b)(1) (emphasis added). For both reasons, the statute leaves ample scope to the Secretary to define the term "administrative or judicial action." He did so in the regulations, which define an "administrative action" to mean "all or a portion of" an IRS civil or criminal proceeding. Sec. 301.7623-2(a)(2), Proced. & Admin. Regs.

The reference in subsection (a) to "amounts collected *by reason of* the information provided" is also ambiguous. Sec. 7623(a) (flush language) (emphasis added). The phrase "by reason of" may plausibly be interpreted to require a substantive contribution by the whistleblower, i.e., the furnishing of factual information that actually helps the IRS identify where the bodies are buried. This interpretation is arguably supported by the final sentence of subsection (b)(1), which says that the amount of any award "shall depend on the extent to which the * * * [whistleblower] substantially contributed to such action." On the other hand, the "by reason of" requirement might be deemed satisfied, as petitioner urges, if a whistleblower provides no useful factual information

but only the name of an allegedly noncompliant taxpayer. This is precisely the sort of statutory ambiguity that may usefully be dispelled by regulation.

Petitioner cites nothing in the statute's legislative history to support his interpretation. Rather, he relies solely on a technical explanation prepared by the staff of the Joint Committee on Taxation (JCT). *See* Staff of J. Comm. on Taxation, Technical Explanation of H.R. 6408, The "Tax Relief and Health Care Act of 2006," at 88 (J. Comm. Print 2006). Such technical explanations are generally prepared by JCT staff members after a tax law has been drafted.[4] These explanations are "not part of the legislative history" and do not constitute "direct evidence of legislative intent." *Zinniel v. Commissioner*, 89 T.C. 357, 366-367 (1987); *see United States v. Woods*, 571 U.S. 31, 48 (2013) (ruling that JCT explanations are not "legitimate tool[s] of statutory interpretation" (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011))).

In any event the JCT statement on which petitioner relies falls far short of showing that "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Congress added section 7623(b) to establish a mandatory award program, as a supplement to the preexisting program under which all awards were discretionary with the IRS. *See* 26 U.S.C. sec. 7623 (2000). Before describing the new law, the JCT staff noted that, under preexisting IRS administrative guidelines for

[4] This particular explanation was published two days after the House passed the bill and the same day that the Senate passed the bill.

discretionary awards, a whistleblower could receive a small award (up to 1% of the amount recovered) if his information "caused the investigation, but had no direct relationship to the determination of tax liabilities." Technical Explanation, *supra*, at 88.

This statement does not help petitioner. The JCT staff was reciting a preexisting IRS administrative guideline; there is no evidence that Congress intended to incorporate this guideline into the text of the amended statute. Moreover, the guideline addressed the section 7623(a) discretionary program, under which the IRS might pay a 1% award to a whistleblower who simply identified a noncompliant taxpayer, without supplying any substantive information about the tax violation. There is no evidence that Congress or the IRS believed that such "tip" awards should have any role to play under section 7623(b), which authorizes mandatory awards ranging from 15% to 30% of the collected proceeds.

b. *Chevron Step Two*

Under step two we must evaluate whether the regulation is a "reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844. We will give deference to the agency's construction unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Ibid.* "In other words we must sustain the regulation so long as it represents a 'reasonable interpretation' of the law Congress enacted." *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. 180, 196 (2020) (quoting *Chevron*, 467 U.S. at 844); *see Feller v. Commissioner*, 135 T.C. 497, 508

(2010) (concluding that the Secretary's construction need not be the only permissible one). We have no difficulty concluding that the regulation passes muster under this test.

The regulations issued in 2014 define what it means for the Secretary to "proceed[] based on information" provided by a whistleblower. Sec. 301.7623- 2(b)(1), Proced. & Admin. Regs. The regulations also define "administrative action" as "all or a portion of an * * * [IRS] civil or criminal proceeding." *Id.* para. (a)(2). This means that a multi-issue examination may comprise more than one administrative action. While not disputing the validity of these definitions, petitioner insists that Example 2 "adds new limiting rules" that are "manifestly contrary to the plain language" of the statute and the balance of the regulations. We disagree.

Paragraph (b)(1) of the regulation supplies general rules for evaluating when the IRS "proceeds based on" or "does not proceed based on" information submitted by the whistleblower. Paragraph (b)(2) says that these principles "may be illustrated by the following examples," of which there are four. Example 2 illustrates a case where an administrative action represents a portion of a larger IRS examination, a situation explicitly contemplated by the definition of "administrative action" in paragraph (a)(2).

By way of analogy, assume that two different whistleblowers allege that a corporation underpaid its tax. The first whistleblower claims that the corporation failed to report gross income, and the IRS initiates an examination. A year later the second whistleblower asserts that the same corporation

claimed an improper deduction, and the IRS expands its examination to include that issue.

In this hypothetical scenario the two portions of the examination constitute separate "administrative actions." Sec. 301.7623-2(a)(2), Proced. & Admin. Regs. The unreported income investigation is an action with which the IRS proceeded on the basis of the first whistleblower's information. And the deduction investigation is an action with which the IRS proceeded on the basis of the second whistleblower's information. Example 2 clarifies that a whistleblower will be rewarded only if the information *that he supplied* results in an adjustment. This is fully consistent with section 7623(b)(1), which provides that a whistleblower is eligible for an award only if the IRS collects proceeds "as a result of the action" and only if the whistleblower "substantially contributed to such action." *Cf. Cook v. Commissioner*, 269 F.3d 854, 858 (7th Cir. 2001) (noting that "examples set forth in regulations remain persuasive authority so long as they do not conflict with the regulations themselves"), *aff'g* 115 T.C. 15 (2000).

This hypothetical scenario is identical in principle to the situation in this case, except that the deduction action here was triggered, not by a second whistleblower, but by the RA's independent investigation of unrelated entries on Target's tax returns. Paragraphs (a)(2) and (b)(1), coupled with Example 2, work together to ensure that a whistleblower is rewarded only for providing information that substantially contributes to a distinct "administrative action." Otherwise whistleblowers would be incentivized to file innumerable claims as mere fishing expeditions,

hoping that the IRS will find something wrong with those taxpayers' returns (related to the information they supplied or not). There is no evidence that Congress wished to encourage this sort of behavior.

In sum, we conclude that the regulatory provisions at issue, taken together, are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Treasury reasonably determined that a multiple-issue IRS examination could comprise more than one "administrative action." And it reasonably concluded that the IRS does not "proceed based on" the whistleblower's information unless that information substantially contributes to the "administrative action" that generates proceeds. We accordingly reject petitioner's challenge to the regulation's validity.

2. *"Related Action"*

Petitioner next contends that, even if Example 2 is valid, he should nonetheless prevail because the portion of the examination pertaining to the bad debt issue constitutes a "related action." Section 7623(b)(1) provides that a whistle- blower is entitled to an award if proceeds are "collected as a result of the action (including any related actions)." A "related action" is "an action against a person other than the person(s) identified in the information provided and subject to the original action(s)." Sec. 301.7623-2(c)(1), Proced. & Admin. Regs. An action is not a "related action" unless "[t]he facts relating to the underpayment of tax * * * are substantially the same as the facts described and documented in the [original] information provided." *Id.* para. (c)(1)(i).

The administrative action in which the RA pursued the bad debt issue is not a "related action" for two distinct reasons. First, that action was not "an action against a person other than the person(s) identified in the information provided." *Id.* para. (c)(1). The bad debt action, like the membership deposits action, was against the same group of nine entities to which we refer as Target. Second, the "[t]he facts relating to" the bad debt action and the membership deposits action were not "substantially the same." *Id.* para. (c)(1)(i). Petitioner's reliance on the "related action" clause is thus unavailing.

Petitioner largely ignores the text of this regulation and instead hitches his wagon to the False Claims Act, 31 U.S.C. secs. 3729-3733 (2006), which he says served as a model for the drafters of section 7623(b). He argues that, under the False Claims Act, "if an administrative action under a different legal theory would be more efficient, the relator in the case would still be able to collect an award for amounts collected by the Government." This assertion is misplaced for at least two reasons. First, the False Claims Act, which is found in title 31 of the U.S. Code, has no application to a tax case such as this. Second, the IRS did not pursue "a different legal theory" for the membership deposits issue. Rather, it recovered proceeds by examining an entirely unrelated issue--the bad debt deduction--that was governed by different law and different facts.

3. *Disputes of Material Fact*

Although petitioner argues that he is entitled to summary judgment, he contends that disputes of

material fact prevent us from granting respondent's cross-motion. He asserts that the administrative record is devoid of information concerning "how and when" the RA identified the bad debt issue. In his view further discovery is necessary "to show the full story of the audit," including whether petitioner's Form 211 somehow tipped the IRS off to the bad debt deduction.

In *Van Bemmelen*, 155 T.C. at 79, we held that whistleblower award cases are not reviewed under the typical summary judgment standard. That is because whistleblower cases are "record rule" cases. *Ibid.* In a "record rule" case we "confine ourselves to the administrative record to decide whether there has been an abuse of discretion." *Id.* at 78. Once the Commissioner certifies the administrative record, "summary judgment serves as a mechanism for deciding, as a matter of law, whether the * * * [Office's] action is supported by the administrative record and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 79.

In whistleblower award cases the "administrative record comprises all in- formation contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges." Sec. 301.7623-3(e)(1), Proced. & Admin. Regs. If a whistleblower believes that the administrative record is insufficient, then he is free to file a motion to supplement the record. *See Van Bemmelen*, 155 T.C. at 73; *Kasper v. Commissioner*, 150 T.C. 8, 20-21 (2018) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)) (noting exceptions that

may justify supplementation). Alternatively, the whistleblower may file a motion to compel production of documents. *See Whistleblower One 10683-13W*, 145 T.C. at 206-207. Petitioner has filed no motion of either sort. Thus, for purposes of resolving the parties' cross-motions for summary judgment, we are confined to the administrative record that is before us.

The administrative record that is before us may not contain exhaustive information about "how and when" the RA identified the bad debt issue, e.g., which line entries on which returns caught his attention, or the date(s) on which he gleaned these insights. But the record provides more than enough evidence to confirm that petitioner is not eligible for a mandatory award. The record contains all of petitioner's submissions to the Office: None of these submissions includes any information about Target's intercompany debt, Target's reporting of a bad debt deduction, or the facts that would be relevant in assessing the propriety of such a deduction. In response to Ms. Beardsley's specific question whether the "whistleblower submission contribute[d] to any of the adjusted issues," the RA replied (with emphasis) that petitioner had not "provided *any* information for the adjusted issues." Because petitioner did not supply any information about the bad debt issue (or about the other issue that generated an adjustment), he is not entitled to an award under section 7623(b). No amount of discovery will change this fact.

To implement the foregoing,

An appropriate order and decision will be entered for respondent.

Appendix E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1268 September Term, 2022

USTC-399-18W

Filed On: July 20, 2023

Michael Lissack,

Appellant

v.

Commissioner of Internal Revenue,

Appellee

BEFORE: Pillard and Katsas, Circuit Judges; and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on July 7, 2023, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

Appendix F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1268 September Term, 2022
USTC-399-18W
Filed On: July 20, 2023

Michael Lissack,

Appellant

v.

Commissioner of Internal Revenue,

Appellee

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's 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

Appendix G

Internal Revenue Code of 1986 (26 U.S.C.)
§ 7623. Expenses of detection of underpayments and fraud, etc. (2017)

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

(1) detecting underpayments of tax, or

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

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

(b) Awards to whistleblowers.–

(1) In general.–If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. 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 collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action, 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 tax, penalties, interest, additions to tax, and additional amounts 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.