No. 23-

IN THE

Supreme Court of the United States

DAVID E. STONE, KARI S. CARROLL, AS SURVIVING SPOUSE OF THOMAS CARROLL, DAVID C. DEPADRO,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commissioner, as an arm of the executive branch, has absolute discretion and sovereign immunity under the Administrative Procedure Act to decline to collect billions of dollars in income taxes on bundled mortgages that are otherwise taxable under the Internal Revenue Code?

RULE 29.6 STATEMENT

The Petitioners are David E. Stone, Kari S. Carroll, and David DePadro. None of the Petitioners nor the Commissioner of the Internal Revenue Service is a publicly held company. No publicly held company owns 10% or more of their stock.

RELATED PROCEEDINGS

- *Carroll and Stone v. Comm'r of Internal Revenue*, No. 4569-16W, United States Tax Court. Judgment entered July 11, 2017.

- *DePadro and Stone v. Comm'r of Internal Revenue*, No. 18773-16W, United States Tax Court. Judgment entered November 15, 2017. Motion to Vacate denied February 28, 2018.

- *Stone, et al. v. Commissioner of Internal Revenue*, No. 22-80154-CIV-MARRA, United States District Court for the Southern District of Florida. Judgment entered June 3, 2022. Rehearing denied July 29, 2022. (Pet. App. 34a-38a, 39a-56a).

- *Stone, et al. v. Commissioner of Internal Revenue*, No. 22-13217, United States Court of Appeals for the Eleventh Circuit. Judgment entered on November 17, 2023. (Pet. App. 1a-19a).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Page

Cited Authorities

INTRODUCTION

At the time of this Petition, Americans owed $12.14 trillion on eighty-four million mortgages. Mortgages represent 70.2% of consumer debt in the United States. The vast majority of such mortgages were originated by institutional lenders, at which point the mortgages and notes became assignable.

This case is about Real Estate Mortgage Investment Conduits (REMICs). REMICs are created and controlled by the largest financial institutions in the world. They hold virtually every residential mortgage loan in the United States that was originated by an institutional lender. Not surprisingly, the income earned by REMICs on this pool of mortgages is an enormous amount of money. Yet Congress decided that such income will not be taxed to their sponsors, *so long as they meet certain dispositive conditions*. The conditions are in the Internal Revenue Code and are clarified in the Code of Federal Regulations.

In practice, REMICs do not meet the required conditions for tax exempt status in the Code or in the regulations. For example, REMICs do not timely obtain or maintain "qualified mortgages" as that term is defined in the Code. REMICs do not even comply with the documentation requirements in their own internal "pooling and service agreements." For example, REMICs are required by their own internal agreements to maintain promissory notes endorsed by the owners. In practice, they do not. They certainly do not meet the 99% compliance threshold required by the Code of Federal Regulations. That means that, by law, REMICs are not secured creditors holding "qualified mortgages," but are instead unsecured creditors of the borrowers whose notes

and mortgages they claim to own. They are therefore disqualified from tax exempt status as a matter of law.

The Petitioners uncovered the problem with REMICs and brought it to the attention of the Internal Revenue Service. The IRS acknowledged receipt of the information. At least some IRS investigators concluded internally that the information was correct. But the IRS refused to interview the Petitioners. It then repeatedly ruled that it will do nothing to collect the taxes owed by REMICs.

This is wrong. It cheats every American taxpayer. This litigation exists because it is the duty of the courts, not the IRS, to interpret the Code. Under our constitutional system of separation of powers, Congress is the branch that makes the laws. The executive branch is charged with enforcing those laws, which sometimes require an exercise in interpretation. But the United States Courts under Article III ultimately interpret the law. Accordingly, if the executive branch is derelict in its duties and misreading the law, the judicial branch has the power and the duty to correct it.

The present Eleventh Circuit decision sought to be reviewed erroneously leaves the executive branch with the last word about the IRS' purported interpretation of the Internal Revenue Code. And in this particular case, the IRS has dropped the ball by failing to collect billions or more in taxes from the largest financial institutions in the world: the entities that underwrote and profited from virtually every residential mortgage in the United States. The big losers in this dispute are everybody else: all the American taxpayers who do follow the rules and pay their fair share of taxes within the bounds of the Code.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court to grant certiorari review of the November 17, 2023 decision of the United States Court of Appeals for the Eleventh Circuit. *Stone v. Comm'r of Internal Revenue*, 84 F.4th 1320 (11th Cir. 2023) (Pet. App. 1a-19a).

OPINIONS BELOW

The subject of this petition is the November 17, 2023 court of appeals opinion, *Stone et al. v. Commissioner of Internal Revenue*, Docket No. 22-13217, 86 F.4th 1320 (11th Cir. 2023). (Pet App. 1a-19a). Below that is the June 3, 2022 order and final judgment of the U.S. District Court for the Southern District of Florida and order denying reconsideration in *Stone et al. v. Commissioner of Internal Revenue* [D.E. 24, 25] in Case No. 22-80154-CIV-MARRA. (Pet. App. 34a-38a, 39a-56a).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2023. (Pet. App. 19a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (allowing review via "writ of certiorari granted upon the petition of any party to any civil or criminal case . . .").

RELEVANT STATUTORY PROVISIONS

At issue is the intent and purpose of the Administrative Procedure Act, 5 U.S.C. sections 701-704, and 706 (reproduced at Pet. App. 57a-63a) and its interplay with 26 U.S.C section 7623. (Pet. App. 20a-33a).

In addition, the underlying dispute (if it had been substantively addressed by the lower courts), would have required consideration of 26 U.S.C. sections 860A and 860D. (Pet. App. 64a-71a). The tax issue in question turns on the controlling definition of "qualified mortgage" found in 26 U.S.C. § 860G(a)(3):

> **(3) QUALIFIED MORTGAGE**
>
> The term "qualified mortgage" means—
>
> **(A)** any obligation (including any participation or certificate of beneficial ownership therein) which is principally secured by an interest in real property and which—
>
> **(i)** is transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC,
>
> **(ii)** is purchased by the REMIC within the 3-month period beginning on the startup day if, except as provided in regulations, such purchase is pursuant to a fixed-price contract in effect on the startup day, or
>
> **(iii)** represents an increase in the principal amount under the original terms of an obligation described in clause (i) or (ii) if such increase—
>
> (I) is attributable to an advance made to the obligor pursuant to

the original terms of a reverse mortgage loan or other obligation,

(II) occurs after the startup day, and

(III) is purchased by the REMIC pursuant to a fixed price contract in effect on the startup day,

(B) any qualified replacement mortgage, and

(C) any regular interest in another REMIC transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC.

For purposes of subparagraph (A), any obligation secured by stock held by a person as a tenant-stockholder (as defined in section 216) in a cooperative housing corporation (as so defined) shall be treated as secured by an interest in real property. For purposes of subparagraph (A), any obligation originated by the United States or any State (or any political subdivision, agency, or instrumentality of the United States or any State) shall be treated as principally secured by an interest in real property if more than 50 percent of such obligations which are transferred to, or purchased by, the REMIC are principally secured by an interest in real property (determined without regard to this sentence).

STATEMENT OF THE CASE

The underlying tax issue

In 1986, Congress enacted a tax reform act which encompassed major revisions to the Internal Revenue Code ("I.R.C." or "the Code"). These revisions included a new Section 860D of the Code (Pet. App. 65a-67a), which defined a Real Estate Mortgage Conduit (a "REMIC") as an entity that could avoid any income taxation on revenue from investments in their mortgage portfolios if the REMIC met certain statutory qualification requirements. This revision would have enabled REMICs and their sponsors to receive special favored income tax treatment as tax-exempt entities so long as they complied with the provisions of the Code.

In practice, the REMICs completely failed to comply with section 860D or the definition of qualified mortgage in section 860G. As a result, REMICs and their sponsors were never legally entitled to receive this favorable tax treatment. In essence, the financial industry separated notes from mortgages, so that the notes could be sold to investors without any recorded transfer of corresponding real estate security. As a result, REMICs could not obtain tax exempt status, and their income was always taxable to their sponsors. It is also known that REMICs routinely do not comply with their own internal documentation requirements, meaning that they do not hold secured notes with enforceable mortgages at all. This routine practice also defeats their tax-exempt status.

Petitioners were prompted to "blow the whistle."

IRS Whistleblower filings

According to the district court complaint (Docket Entry 1), including its exhibits, on March 18, 2011, two of the Petitioners filed Whistleblower claims with the IRS. [D.E. 1 Exhibit A; see D.E. 1 at ¶24]. A few months later, the assigned IRS analyst referred both Whistleblower Claims to the IRS Large Business and International Division Financial Services Industry ("LB&I") for auditing of the Whistleblower Claims. [D.E. 1 at ¶24.C].

Further supplemental documents were provided to LB&I in the course of the review by LB&I. Two compact discs were provided containing information on the named taxpayer-bank sponsors of various REMICs. [D.E. 1 at ¶ 24.D].

On August 28, 2012, there was an exchange of internal emails at the IRS LB&I discussing the fact that the claim could have far-reaching results. [D.E. 1 at ¶ 24.E.]. If the identified REMICs were not compliant, it likely meant that the same issues applied broadly. [D.E. 1 Exhibit D].

The IRS Field Audit Division Group 1114 considered the claim. In a memorandum to the manager of this Group, the assigned analyst stated in part:

> These returns relate to a [Whistleblower] claim impacting numerous taxpayers. The REMIC IPG has reviewed the information and determined it has merit. LBI executives and Counsel have decided that only a sample of returns/taxpayers should be examined at this

> time and the REMIC IPG selected this return. (emphasis added).

[D.E. 1 at 9 ¶ 24.F].

The same analyst then sent a memorandum to the Senior Team Coordinator and the LB&I audit team leader, that the Government has determined to examine the issue identified and stated in part:

> Although the government does not dispute the claimants [sic] allegations, to examine the transfer of title for all loans in the trust, the government would expend significant resources. (emphasis added).

[D.E. 1 at ¶ 24.G, Exhibit E].

On October 27, 2015, the IRS sent its Preliminary Denial Letter, and on February 1, 2016, the IRS sent its Final Denial Letter. [D.E. 1 Composite Exhibit F].

On February 26, 2016, two Petitioners sought a review of the denial of their Whistleblower Claims by the U.S. Tax Court. [D.E. 1 Exhibit G]. On July 11, 2017, the Tax Court affirmed the decision that Petitioners Stone and Carroll were not entitled to a monetary award. [D.E. 1 Exhibit H].

On March 26, 2012, a third Petitioner, Mr. DePadro, filed his Whistleblower Claim (claim 2012-003933). [D.E. 1 Exhibit I; see D.E. 1 at ¶25]. Only days later, the IRS sent an Acknowledgement of Claim letter. [D.E. 1 Exhibit J].

Four years later, on March 22, 2016, the IRS sent a Preliminary Denial Letter. On August 27, 2016, the IRS sent a Final Denial Letter. [D.E. 1 Exhibit K].

On August 29, 2016, this Petitioner sought review of the IRS' Final Denial to the Tax Court. [D.E. 1 Exhibit L]. On November 11, 2017, the Tax Court affirmed the Commissioner of Internal Revenue's final determinations that no award was appropriate under section 7623. [D.E. 1 Exhibit M].

The United States Tax Court was, from the very beginning, the wrong court to examine the substantive tax issues that Petitioners had raised with the IRS. Under 26 U.S.C section 7623, that court had extremely limited jurisdiction as an Article I court to decide whether the Petitioners were entitled to a finders' fee based on the resulting recovery. Here, there had been no recovery. Of course, no fee was due.

Petitioners alleged below that the IRS egregiously misunderstood and misapplied the substantive tax law. [D.E. 1 at ¶ 26]. In other words, to qualify as a tax-exempt entity, any REMIC must take title to a pool of qualified mortgages within 90 days of the startup date. That requirement was not being met on a widespread basis; the IRS knew it; and still misapplied the law. Rather, the IRS made an erroneous legal decision under the "substance over form" doctrine established in *Gregory v. Helvering*, 293 U.S. 465 (1935). (The teaching of *Gregory* is that the IRS may look through the form of a taxpayer's structure to determine whether in substance it qualifies for the taxpayer's desired taxation result. [D.E. 1 at ¶ 26]).

Moreover, the IRS mistakenly understood Whistleblower claims to be primarily based upon fraudulent "robo-signing." [D.E. 1 at ¶ 27]. The decision to not pursue taxpayers that engaged in robo-signing, though a fraudulent practice that should not be tolerated, was arguably not a sufficient basis to allow Article III APA review. The Petitioners' claims, on the other hand, were statutory and invoked the *legal definition* of REMIC under 26 U.S.C. 860D and of "qualified mortgages" under section 860G. It was a pure issue of law.

In addition, the IRS has written standards of conduct for IRS procedure when it receives a tip from a Whistleblower. [D.E. 1 Ex. N]. According to the Deputy Commissioner for Services and Enforcement for the IRS, a confidential informant should be extensively interviewed and kept informed as to the development of the submitted information to assist the IRS in a more efficient investigation. Unfortunately, the IRS failed to follow its own guidelines. [D.E. 1 at ¶¶ 28-29].

Statement of the Case

Petitioners filed a lawsuit under the Administrative Procedure Act in the Southern District of Florida, creating Case No. 22-80154-CIV-MARRA. The Petitioners alleged below that their underlying tax allegations were true and had sealed documents in hand to validate the Whistleblower claims. [D.E. 1 at ¶ 26]. As a result, (1) the claims should have been properly investigated; (2) at least *some* REMICs should have been reviewed and audited; and (3) the IRS should have conducted administrative proceedings on at least *some* REMICs claims to recover the tax due from the responsible entities. [D.E. 1 at ¶ 26].

The IRS failed to meet these standards in its treatment of the previously filed whistleblower claims. [D.E. 1 at ¶ 29]. It reached "final agency action" on the claims. [D.E. 1 at ¶4]. Based on those allegations, the APA suit below seeking review resulted. [D.E. 1]. The Petitioners contend that because REMICs owe tax, the IRS has a statutory duty to investigate and collect the tax, or to at least make an informed decision that is not arbitrary and capricious. Although the IRS may have "discretion" to decide not to audit certain taxpayers, that "discretion" does not include the right to write off an entire *category* of revenue contrary to Congressional intent. [D.E. 1 ¶ 26]. The IRS did not engage in reasoned decision-making in purporting to exercise discretion and therefore reached arbitrary and capricious final agency action. [D.E. 1 ¶¶ 31-39].

The lower courts, including the Eleventh Circuit, have now taken the position that the IRS' position is simply not reviewable under the APA. According to the lower courts, the executive branch has discretion to globally decline to pursue tax from non-compliant REMICS (which is all REMICs because of certain industry-wide practices). In *Stone, et al. v. Commissioner of Internal Revenue*, No. 22-13217 (Pet. App. 1a-19a), the Eleventh Circuit held that the executive branch has "discretion" to decide whether to make some effort to collect the tax due. Accordingly, under this reasoning, nobody can bring the intertwined legal and factual issues up for review under the APA, including Whistleblowers.

REASONS FOR GRANTING THE WRIT

In the decision below, the Eleventh Circuit decided the matter on subject matter grounds. It held that the district court lacked subject matter jurisdiction to review a matter that is committed to the discretion of the IRS. (Pet. App. 19a). It therefore affirmed. *Id.*

The Eleventh Circuit's reasoning (1) creates a problem of circular reasoning, in which APA cases are dismissed for want of "jurisdiction" before agency action can actually be deemed "discretionary" or prosecutorial in nature; and (2) effectively vests the executive branch with more final lawmaking power under the guise of agency discretion than was ever contemplated in the Constitution or *Heckler v. Chaney*, 470 U.S. 821, 833, 105 S. Ct. 1649, 1656 n.4, 84 L. Ed. 2d 714 (1985).

The circular reasoning problem arises because at the motion-to-dismiss stage, it isn't possible to know or determine if an agency decision really is purely discretionary. After all, an asserted exercise of discretion informed by incorrect facts, or a misreading of the Internal Revenue Code, is not discretion at all. Discretion always implies a "'range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Betty K Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005) (quoting *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1324 (11th Cir. 2005)). The Petitioners alleged at paragraph 26 of the Complaint that the IRS had misapplied the "substance over form" legal doctrine discussed in *Gregory v Helvering*, 293 U.S. 465 (1935). [D.E. 1 at 26].

The Complaint itself established that the IRS could not lawfully "step into the shoes of a taxpayer to disregard a congressionally mandated pre-requisite to obtain favored tax treatment because it mistakenly thinks the tax result of non-compliance is the same." [D.E. 1 ¶26.] The district court and the Eleventh Circuit did not directly reach these arguments.

At the motion to dismiss stage, the allegations of the complaint should have been accepted, particularly when unchallenged by the government. (And in oral argument, the presiding Circuit Judge, Judge Jordan, indicated that the appellate court assumed for purposes of argument that all of the allegations were true.) At the motion to dismiss stage, the government did not and could not establish that it had "discretion" to ignore the tax code, rewrite section 860D, or wholly abdicate specific statutory responsibilities. The determination of whether REMICs hold "qualified mortgages" as defined is an objective determination, not a discretionary one. Furthermore, the record offers no basis to assume that a policy of exempting REMICs from federal taxation is "discretionary." Yet a quick dismissal on jurisdictional grounds prevents judicial exploration and resolution of those very factual or legal premises. The Eleventh Circuit approach therefore leaves executive branch mistakes about the law and facts uncorrected, no matter how flawed these initial assumptions or premises may be.

This Court should grant the writ and review the decision of the court of appeals, because it extends *Heckler v. Chaney*, 470 U.S. 821, 833, 105 S. Ct. 1649, 1656 n.4, 84 L. Ed. 2d 714 (1985) beyond any conceivable intention of the *Heckler* Court. The executive branch should not be

given unfettered ability under the APA to leave billions of REMIC taxes uncollected based on mistake, folly, or incompetence, disguised as "discretion". It was precisely because it foresaw this issue that this Court intentionally left open the possibility of APA challenges in enforcement where an agency "consciously and expressly adopt[s] a general policy" that is "so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833, 105 S. Ct. at 1656 n.4, (e.s.) (citing *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc)).

Here, Petitioners presented a pure issue of law for the district court below. The dispositive question was the meaning of the defined term "qualified mortgage" Petitioners alleged, and are prepared to prove at trial beyond all possible doubt, that REMICs did not and do not *obtain* "qualified mortgages," as defined, within the 90 days of their creation. This has always been fatal to their tax-exempt status. It is irremediable. Nor do REMICs *maintain* "qualified mortgages," which is also fatal to the statutory tax exemption. The IRS' own regulations in effect are clear. Any deviation beyond *de minimis* noncompliance is disqualifying. 26 C.F.R. § 1.860D-1(b)(3)(i). And the "safe harbor" to establish *de minimis* noncompliance is also defined: 1% or less. 26 C.F.R. § 1.860D-1(b)(3)(ii). These are pure issues of law. They establish that REMICs are not tax exempt. Period.

Because the legal issue is so fundamental, and because the same facts apply to so many similarly situated taxpayers, the scope of Petitioners' claims is extraordinarily broad. As a practical matter, every REMIC is affected. The amount of unpaid tax at issue here is staggering. The claim literally reaches the tax on the

income of every U.S. residential note-and-mortgage that has been written by lenders, bundled with other notes, securitized, and sold off to investors. The question is so all-encompassing that the IRS' position on REMIC income is its "general policy" for purposes of *Heckler v. Chaney* rather than a specific discretionary decision to pursue or forego a claim against some specific targeted taxpayer. After all, Congress might reasonably have expected that the IRS will not pursue every REMIC's failure to meet the conditions of IRC § 860(D)(4). On a case-by-case basis, the IRS could determine that certain prosecutions just aren't worth it. Those are all reasonable considerations, truly based on prosecutorial discretion, which would never justify judicial intervention. On the other hand, after enacting sections 860A – D, Congress could not have contemplated that the executive branch would forego *all* such attempts to collect the revenue due from REMICs.

Here, the IRS's present position is categorical. It decided to pursue *no* REMICs despite the fact (as is admitted for purposes of the motion to dismiss) that all REMICs are not complying. Worse, it decided to do so based on a mistake of law.

Through this Petition, these Petitioners ask this Court to take this case and hold that allowing REMICs to simply flout the Internal Revenue Code based on the IRS' mistake of law is not "discretion" at all. It is a legal decision or a misapprehension of law and facts that necessarily remains reviewable under the APA. The "abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996).

The IRS claims to have feared that it had insufficient resources to investigate the titling of mortgages held by REMICs to see if they are "qualified mortgages." But of course, it never asked the Petitioners about this issue. And its concern turns out to have been completely illogical and backwards. Under the Code of Federal Regulations implementing section 860D, the onus is entirely on the taxpayer, not the IRS, to keep sufficient records of substantial (i.e., 99%) compliance with "qualified mortgage" requirements. 26 C.F.R. § 1.860D-1(d)(3) ("Definition of a REMIC"):

> **(3) Requirement to keep sufficient records.** A qualified entity, as defined in paragraph (c)(3) of this section, that elects to be a REMIC must keep sufficient records concerning its investments to show that it has complied with the provisions of sections 860A through 860G and the regulations thereunder during each taxable year.

In other words, all the IRS has to do is read the taxpayer's records, which the taxpayer *must* maintain as a condition of the exemption. If the taxpayer has no proof, it gets no tax exemption. Period. To date, however, the IRS' position is a form of "see-no-evil." And the position of the lower courts, including the Eleventh Circuit, is that they will do nothing based on sovereign immunity or the "discretion" afforded to the executive branch.

In sum, the IRS was egregiously mistaken when it decided that it would have to dig into public real property records and research whether mortgages actually secure 99% of the notes owned by a REMIC. It would of course

be unreasonable to judicially mandate or micromanage an investigation of extensive real property records. But as the regulations currently stand, the onus is not on the IRS to do any fact gathering, but merely to read the taxpayer's own mandatory documentation of compliance. Accordingly, the IRS' categorical decision to do nothing about the taxes owed by REMICs amounts to willful blindness to the taxes owed, leading to irrational or arbitrary action. *E.g.*, *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 271, 284 (E.D. Pa. 2018) (denying motion to dismiss APA challenge to Justice Department "conditions" on receipt of Byrne Justice Assistance Grant program funds).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should review the decision of the court of appeals on its merits.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 17, 2023

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13217

DAVID E. STONE, KARI S. CARROLL, AS SURVIVING SPOUSE OF THOMAS CARROLL, DAVID C. DEPADRO,

Plaintiffs-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida D.C.
Docket No. 9:22-cv-80154-KAM.

November 17, 2023, Filed

Before JORDAN, ROSENBAUM, and HULL, Circuit Judges.

JORDAN, Circuit Judge:

A whistleblower, generally speaking, is a person who goes public with allegations of mismanagement

or wrongdoing in a government agency or a private organization. *See* The American Heritage Dictionary of the English Language 1960-61 (4th ed. 2009); William Safire, Safire's New Political Dictionary 872 (1993). Sometimes a whistleblower will act for altruistic reasons, but sometimes the motivation is financial. This case involves the latter.

The Internal Revenue Code contains a whistleblower provision which allows persons to report alleged violations of the federal tax laws and receive up to 30% of any unpaid taxes or penalties collected by the IRS. *See* 26 U.S.C. § 7623(b). But what happens if the IRS, despite crediting the information, decides not to institute enforcement proceedings against the offending taxpayers because the effort would be too costly, too burdensome, or too time-consuming? Does the whistleblower have any judicial remedy against the IRS under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)?

The district court said no, and dismissed the APA complaint filed by whistleblowers David Stone, Kari Carroll (as the surviving spouse of Thomas Carroll), and David Depadro for lack of subject-matter jurisdiction. We conclude that the IRS' refusal to follow through on the information provided by these whistleblowers was a decision "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and is therefore unreviewable under the APA. We affirm.[1]

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1. For ease, we refer to Mr. Stone, Ms. Carroll, and Mr. Depadro collectively as the appellants.

Appendix A

I

We conduct plenary review of the district court's dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013). When, as here, there is a facial challenge to subject-matter jurisdiction, we take the factual allegations in the complaint as true. *See McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007).

An appellee, as the prevailing party in the district court, may defend the judgment on any ground appearing in the record as long as it does not seek to enlarge its rights or lessen the rights of the appellants. *See Jennings v. Stephens*, 574 U.S. 271, 276, 135 S. Ct. 793, 190 L. Ed. 2d 662 (2015). We "may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the district court." *Equal Emp. Opp. Comm'n v. STME, LLC*, 938 F.3d 1305, 1313 (11th Cir. 2019) (quotation and bracket omitted).

II

Under the Internal Revenue Code, Real Estate Mortgage Conduits ("REMICs") are entities that can avoid income taxation on investment revenue from their mortgage portfolios if they comply with certain statutory requirements. *See* 26 U.S.C. §§ 860A *et seq.* The REMIC requirements are set forth in 26 U.S.C. § 860D(a), and one

of them is that "substantially all" of the entity's assets must "consist of qualified mortgages and permitted investments." 26 U.S.C. § 860D(a)(4).

A

On March 18, 2011, Mr. Stone and Mr. Carroll (now represented by his wife, Ms. Carroll) jointly filed whistleblower claims with the IRS through a Form 211 (an "Application for Award for Original Information"). They submitted the claims pursuant to 26 U.S.C. § 7623.[2]

Mr. Stone and Mr. Carroll alleged that the financial industry, including over 330 entities identified in their claims, separated notes from mortgages so that the notes could be sold to investors without any recorded transfer of the real estate security. Once separated, the notes and their underlying debt obligations were no longer secured, thereby removing their status as qualified, tax-exempt REMICs. Because these REMICs did not satisfy the statutory requirements of § 860D(a)(4), their income—in the hundreds of millions of dollars—was always taxable to their sponsors. And this income was therefore owed to the United States by those sponsors.

The IRS Whistleblower Office referred the claims to the IRS' Large Business and International Division ("LB&I") for audit. Mr. Stone and Mr. Carroll provided supplemental documentation to the LB&I Division,

2. Due to its length, § 7623 is reproduced in an appendix to our opinion.

including information on the named taxpayer-bank sponsors of the various REMICs that they claimed failed to comply with the statutory requirements. LB&I personnel reviewed the whistleblower claims and, on August 28, 2012, internally determined that these claims could have far-reaching implications beyond the entities identified by Mr. Stone and Mr. Carroll. Indeed, after reviewing the information provided in the whistleblower claims, an IRS auditing employee wrote that the "REMIC IPG has reviewed the information and determined it has merit," and recommended that a sample of the identified taxpayers be examined.

Ultimately, however, the IRS' LB&I Division decided not to take any action on the whistleblower claims and recommended that the claim for an award be denied on that basis. Internally, the IRS memorialized its decision in an evaluation report, explaining that "[t]hough the Government does not dispute the claimants' allegations, to examine the transfer of title for all loans in the trust, the Government would expend significant resources." The evaluation report also analyzed other aspects of the whistleblower claims, including the use of the MERS system by the mortgage securitization industry, the alleged harm to the government or the investors of the audited sample entities, and the relevant entities' possible compliance with the substance of federal requirements despite imperfections in form. Based on this analysis, the IRS decided that it would take no action, and on October 27, 2015, sent preliminary denial letters to Mr. Stone and Mr. Carroll. The IRS issued a final denial on February 1, 2016.

Mr. Stone, Mr. Carroll, and Mr. Depardo filed a parallel joint whistleblower claim in March of 2012, alleging that a Deutsche Bank subsidiary had wrongfully claimed REMIC tax-exempt status. This claim fared no better and, on August 27, 2016, the IRS rendered a final denial on that claim as well.

B

The appellants filed petitions for review of each of these denials, respectively, in the Tax Court. The petitions were filed under 26 U.S.C. § 7623(b)(4).

Regarding the first whistleblower denial, Mr. Stone and Mr. Carroll jointly requested, among other things, a final determination, a declaratory decree, and/or injunctive relief from the Tax Court compelling the IRS to set aside the denial, declaring the denial "arbitrary, capricious, and contrary to law," compelling the IRS to enforce the relevant tax laws, and granting "quantum meriut" fees of $2,727,000.00 for each claimant as compensation for their whistleblower services. The Tax Court granted the IRS' motion for summary judgment, affirming the denial of the claim for an award and concluding that the prerequisites for an award had not been met. The Tax Court noted, however, that § 7623(b)—the provision under which the petition was brought—did not confer authority upon it to review the alleged tax liabilities underlying the claims, nor did it authorize it to direct the IRS to commence an enforcement action. Mr. Stone and Mr. Carroll did not seek appellate review of the Tax Court's decision.

Mr. Depadro and Mr. Stone filed a second petition in the Tax Court related to the Deutsche Bank whistleblower claim. Like its predecessor, the second petition requested, among other things, a declaration that the IRS failed to apply and enforce the relevant tax laws equitably and conducted its "interaction" with Mr. Depadro and Mr. Stone in an arbitrary and capricious manner; an order setting aside the denial and compelling the IRS to audit their claims; a finding that there was an "implied contract" with the IRS under common law; an order compelling the IRS to investigate the subject taxpayers; and an order awarding "quantum meruit" fees of $2,727,000.00 each. This petition was ultimately dismissed by the Tax Court, which affirmed the IRS' denial of the claim for an award.

Mr. Depadro and Mr. Stone moved to vacate that order of dismissal, asserting that the Tax Court failed to consider whether the IRS had complied with the APA. The Tax Court rejected this argument, explaining that the APA did not expand its jurisdiction under § 7623(b) to analyze anything beyond the IRS' award determination. The Tax Court explained that the central issue was "whether the IRS collected proceeds as a result of an administrative or judicial action using the whistleblower's information, not whether it could have or should have." Mr. Depadro and Mr. Stone did not seek appellate review of the Tax Court's decision.

C

In January of 2022, the appellants jointly filed a complaint in the district court seeking review of the IRS'

denial of their whistleblower claims under the APA, 5 U.S.C. § 706(2)(A). Specifically, the appellants brought a single count under the APA for the IRS' alleged "arbitrary and capricious agency action" in denying their claims. The appellants alleged that their claims "should have been properly investigated," that the "REMICs should have been reviewed and audited," and that "the IRS should have conducted administrative proceedings on their claims." The appellants further alleged that the IRS misunderstood and misapplied the "substance over form" doctrine, mistakenly believed the whistleblower claims to be primarily based on fraudulent "robo-signing," and failed to meet the standards espoused in the IRS' own written policy statement. Accordingly, the appellants requested that the district court rule that the IRS' final denials were unlawful, set them aside, and remand their whistleblower claims for review, enforcement and collection proceedings, and a whistleblower award.

The district court dismissed the complaint without prejudice for lack of subject-matter jurisdiction, ruling that the appellants had an adequate remedy in the Tax Court that barred the application of the APA's waiver of sovereign immunity pursuant to 5 U.S.C. § 704 (providing for judicial review of a final agency action "for which there is no other adequate remedy in a court"). Though it concluded that it lacked jurisdiction, the district court alternatively dismissed the complaint with prejudice on *res judicata* grounds based on the Tax Court's previous two decisions affirming the denials.[3]

3. The government, in its motion to dismiss, argued that the IRS' decision not to institute enforcement or collection proceedings

Following a review of the record and with the benefit of oral argument, we affirm the district court's dismissal of the appellants' complaint without prejudice, albeit for different reasons. Specifically, we conclude that judicial review is not permitted under the APA because the IRS' decisions to not pursue enforcement actions were "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2).

III

The United States and its agencies are immune from suit unless Congress "unequivocally" waives that immunity by statute. *See Lehman v. Nakshian*, 453 U.S. 156, 160-62, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981). "[A]nd the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941). The Supreme Court has said that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999).

When applicable, the APA provides a waiver of sovereign immunity. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215-16, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012). The

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was "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and as a result, judicial review was not permitted. The district court did not address this argument, but the government presses it on appeal.

appellants, as the parties seeking to rely on the APA, must establish that their claim falls within the APA's terms. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003).

A

A valid whistleblower claim, by itself, is insufficient to require a statutory award under 26 U.S.C. § 7623(b). The IRS may make an award only if it institutes an administrative proceeding or judicial action and recovers proceeds. *See* 26 C.F.R. § 301.7623-1(a) ("The awards provided by [§] 7623 . . . must be paid from collected proceeds[.]"); 16 Boris Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶ 114.6.4 (Nov. 2023) (explaining that the IRS must proceed with an administrative or judicial action and recover proceeds). Here, the IRS chose not to institute enforcement actions based on the appellants' whistleblower claims, and therefore, never collected any proceeds.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992). Under the APA, any person "adversely affected or aggrieved" by an agency action, including a "failure to act," is entitled to judicial review of such action, as long as the action is a "final agency action for which there is no other adequate remedy in a court." *See generally* 5 U.S.C. §§ 701-706. Judicial review under the APA is inappropriate, however, when "agency action is committed to agency discretion by law." *Id.* § 701(a)(2). As

relevant here, an agency's refusal to institute investigative or enforcement proceedings generally falls within the gamut of § 701(a)(2)'s exception to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 837-38, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). *See also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568, 204 L. Ed. 2d 978 (2019) ("We have generally limited the [§ 701(a)(2)] exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings[.]") (citations and internal quotation marks omitted).

The Supreme Court has repeatedly recognized "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831 (collecting cases). Agency refusals to enforce or investigate not only fall outside of the scope of the APA's general presumption of review, they are also presumptively unreviewable. *See id.* This is due "in no small part to the general unsuitability for judicial review" of such discretionary decisions. *See id.*

There are a number of reasons for this unsuitability. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1906, 207 L. Ed. 2d 353 (2020) (citing *Heckler*, 470 U.S. at 831). For starters, an agency decision not to enforce or investigate typically "involves a complicated balancing of a number of factors which are peculiarly within its expertise," requiring the agency to determine "not only . . . whether a violation has occurred, but [also] whether agency resources are best spent on

this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. In addition, non-enforcement decisions generally do not involve an agency's "coercive power over an individual's liberty or property rights, and thus do[ ] not infringe upon areas that courts often are called upon to protect." *Id.* at 832 (emphasis omitted). *See also* 33 Richard Murphy, et al., Federal Practice and Procedure § 8325 (2d ed. 2018 & Apr. 2023 update) (explaining that *Heckler* relied heavily on past practices and functional concerns to justify adopting a rule that agency decisions refusing to initiate enforcement actions are "presumptively unreviewable").

Nevertheless, this presumption against judicial review is just that—a presumption. It may be rebutted by a showing that "the substantive statute [at issue] has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 at 832-33. By enacting such a statute, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. Congress can indicate its intent to circumscribe enforcement discretion by requiring "meaningful standards for defining the limits of that discretion." *Id.* at 834.[4]

4. Some have criticized the Supreme Court's "action/inaction distinction" as "incoherent and hard to apply." Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 4 (2008). In at least some circumstances, the line

Applying these principles here, we conclude that the IRS' denials of the appellants' whistleblower claims—based on a determination that enforcement actions would expend "significant resources"—were committed to the agency's discretion by law, and were therefore presumptively unreviewable. The appellants have not pointed to anything in § 7623 or any other substantive statute that rebuts this presumption. As a result, the APA's waiver of sovereign immunity does not apply, and the district court was correct in ruling that it lacked subject-matter jurisdiction.

Acknowledging that the IRS "arguably" retains discretion to choose whether to investigate or bring enforcement actions, the appellants attempt to re-frame their case as one seeking the "review and correct[ion] [of] a wrongheaded, irrational blanket policy decision" by the IRS. In other words, the appellants assert that they are not in fact seeking to force an audit or prosecution of the REMIC entities. Instead, they say they request only judicial review of the IRS' purported blanket denials and

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is indeed blurry. *Compare, e.g., Massachusetts v. EPA*, 549 U.S. 497, 527, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) ("There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action."), *with, e.g., Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1084 (11th Cir. 2012) ("The decision whether to initiate rulemaking, like the exercise of enforcement discretion, typically involves a complex balancing of factors, such as the agency's priorities and the availability of resources, that the agency is better equipped than courts to undertake.").

the agency's "arbitrary and capricious" misapplication of the "substance over form" doctrine discussed in *Gregory v. Helvering*, 293 U.S. 465, 55 S. Ct. 266, 79 L. Ed. 596 (1935). We are unpersuaded by the appellants' argument.

In their complaint, the appellants expressly sought to force an investigation or enforcement action by the IRS through declaratory or injunctive relief from the district court. *See* Compl. at 13 (requesting, in their prayer for relief, that the court "[h]old unlawful and set aside" the IRS' denials, "[r]emand" the appellants' claims "to the IRS for review and appropriate action, including but not limited to, collection proceedings," and "[r]equire the IRS to award [the appellants] any [w]histleblower awards due to them"). The very basis of the complaint was that the IRS should have properly investigated the appellants' whistleblower claims, should have reviewed and audited the REMICs, and should have conducted administrative proceedings on the whistleblower claims, thus ultimately entitling the appellants to statutory whistleblower awards. *See id.* ¶ 26. As the appellants acknowledge, all of these are actions within the IRS' discretion. *See* Appellants' Br. at 30-31.

Moreover, the appellants' complaint lacks any allegation that the IRS' denials constituted the blanket "general policy" upon which their appeal now relies—a theory, by the way, not raised in the appellants' response to the agency's motion to dismiss. Though the Supreme Court has left open the possibility of judicial review for "a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general

policy' that is so extreme as to amount to an abdication of its statutory responsibilities," *Heckler*, 470 U.S at 833 n.4, no such general policy is alleged here.[5]

Indeed, the complaint (and its attached exhibits) indicate that the IRS reviewed the appellants' whistleblower claims, conducted the very balancing espoused in *Heckler*, and, in its discretion, determined that the investigative, enforcement, and collection efforts were not worth the expenditure of significant resources. *See* Compl. ¶ 24, Ex. E. This was a prototypical non-enforcement decision by a federal agency.

The appellants complain that the IRS' decision was wrongheaded and will result in continued violations of the tax laws and a significant loss of tax revenue. Even if they are possibly right, the decision is still not one we can review. Almost every agency decision to not undertake enforcement action will have its detractors, but the availability of judicial review under the APA does not depend on whether that decision was the correct one.

We are equally unpersuaded that the IRS' alleged misapplication of the substance-over-form doctrine somehow moves the needle. First, even taking the appellants' allegations as true, the IRS' discussion of

5. The Supreme Court "express[ed] no opinion on whether such [general policy] decisions would be unreviewable under § 701(a)(2)." *Heckler*, 470 U.S. 833 n.4. Rather, the Court noted that "in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" *Id.*

the substance-over-form issue was just one of numerous factors discussed in the evaluation report, once more indicating that the agency undertook a balancing analysis "peculiarly within its expertise." *Heckler*, 470 U.S. at 830-31. An agency must consider "whether a violation has occurred," but though it "is far better equipped than the courts to deal with the many variables involved," it "generally cannot act against each technical violation of the statute it is charged with enforcing." *Id.* at 831.

Even if the IRS had reviewed the appellants' whistleblower claims and conclusively determined that the identified REMICs were in fact violating the Internal Revenue Code, *Heckler* underscores that the IRS *still would not have been required* to take enforcement actions against those REMICs based on its discretion to determine the agency's complex enforcement priorities. This is not to say that an agency can completely abdicate its statutory obligations. But the IRS is entrusted by Congress with reviewing allegations of tax violations and determining whether it is in the government's best interest to pursue specific allegations based on a variety of factors. The IRS did so here.

The appellants have not cited to any specific statute that somehow limits the IRS' discretion to act on whistleblower claims. As a result, there is no "sufficient 'law to apply' as to allow judicial review." *Greenwood Utilities Comm'n v. Hodel*, 764 F.2d 1459, 1464 (11th Cir. 1985). *See also Heckler*, 470 U.S. at 837 (holding that a statute did not provide meaningful standards because it did not "speak[ ] to the criteria which shall be used

by the agency for investigating possible violations of the [statute]"). Statutory language that merely authorizes agency enforcement or sanctions is insufficient. *See id.* at 835 (statutory provisions authorizing the agency to conduct investigations and stating that any person who violates the statute "shall be imprisoned . . . or fined" did not constrain the agency's enforcement discretion).

We note, as well, that the IRS regulation which implements § 7623 does not provide any standards cabining or limiting the agency's exercise of discretion in deciding whether to begin enforcement actions based on whistleblower claims. *See* 26 C.F.R. § 301.7623-1(a)-(f). This confirms our conclusion that § 701(a)(2)'s exception to judicial review applies.[6]

C

In their brief, the appellants suggest that a 2012 internal memorandum written by Steven T. Miller, IRS Deputy Commissioner for Services and Enforcement, may constitute "meaningful standards" for defining the limits of the IRS' discretion with regard to whistleblower claims. The memorandum, addressed to various IRS leaders, explained that the IRS Whistleblower Office would be working with Mr. Miller's group to establish operating guidelines and procedures to improve the timeliness and quality of the agency's investigative and enforcement decisions. Mr. Miller outlined various key principles behind the prospective procedures, including timeliness

6. The regulation is also reproduced in the appendix.

and the usefulness of whistleblower debriefing. Notably, though the memorandum does contain expectations regarding the timeliness of whistleblower determinations, it also reflects an understanding "that there will be times when these timelines cannot be met, and exceptions will be necessary to ensure that the decision on whether to proceed to an audit or investigation considers all relevant information." Compl., Ex. N at 2.

Borrowing language from *Heckler*, we find this purported policy statement "singularly unhelpful." *Heckler*, 470 U.S. at 836. For one, the memorandum does not reflect any statutory directive from Congress. Moreover, contrary to the appellants' assertion, it does not set out "an entire class of prerequisite procedural steps" to be undertaken by the IRS. Instead, it outlines general guidelines and expected timelines for analyzing whistleblower claims. The memorandum also fails to place any limits or obligations on the IRS' discretion to enforce or investigate claims, and indeed, *highlights* the agency's discretion. *Cf. id.* ("Although the statement indicates that the agency considered itself 'obligated' to take certain investigative actions, that language did not arise in the course of discussing the agency's discretion to exercise its enforcement power, but rather in the context of describing agency policy."). "Whatever force such a statement might have, and leaving to one side the problem of whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce," the language in Mr. Miller's memorandum cannot "plausibly be read to override the agency's" enforcement discretion as outlined above. *See id.*

IV

The IRS' decisions to not take enforcement actions pursuant to the appellants' whistleblower claims are matters "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). The appellants have failed to identify any statutory or regulatory constraints on the IRS' discretion to decline to investigate alleged tax violations or to enforce the tax laws. Thus, the APA's waiver of sovereign immunity does not apply and the district court was without subject-matter jurisdiction to review the whistleblowers' complaint.[7]

We affirm the district court's dismissal of the complaint for lack of subject-matter jurisdiction but remand for purposes of revising the judgment to reflect that the dismissal is only under § 701(a)(2) and is without prejudice.

Affirmed as to the Dismissal for Lack of Subject-Matter Jurisdiction and Remanded for Purposes of Revising the Judgment.

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7. Given our resolution, we do not address the district court's § 704 and *res judicata* rulings.

Appendix A

APPENDIX

26 U.S.C. § 7623. EXPENSES OF DETECTION OF UNDERPAYMENTS AND FRAUD, ETC.

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

(1) detecting underpayments of tax, or

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

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

(b) Awards to whistleblowers.--

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

without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

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

(A) In general.--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

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

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

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

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

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

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

(6) Additional rules.--

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

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

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

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

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

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

(A) criminal fines and civil forfeitures, and

(B) violations of reporting requirements.

(d) Civil action to protect against retaliation cases.--

(1) Anti-retaliation whistleblower protection for employees.--No employer, or any officer, employee, contractor, subcontractor, or agent of such employer, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment (including through an act in the ordinary course of such employee's duties) in reprisal for any lawful act done by the employee--

(A) to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, when the information or assistance is provided to the Internal Revenue Service, the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, or

(B) to testify, participate in, or otherwise assist in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

(2) Enforcement action.--

(A) In general.--A person who alleges discharge or other reprisal by any person in violation of paragraph (1) may seek relief under paragraph (3) by--

(i) filing a complaint with the Secretary of Labor, or

(ii) if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith

of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(B) Procedure.--

(i) In general.--An action under subparagraph (A)(i) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(ii) Exception.--Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(iii) Burdens of proof.--An action brought under subparagraph (A)(ii) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code, except that in applying such section--

(I) "behavior described in paragraph (1)" shall be substituted for "behavior described in paragraphs (1) through (4) of subsection (a)" each place it appears in paragraph (2)(B) thereof, and

(II) "a violation of paragraph (1)" shall be substituted for "a violation of subsection (a)" each place it appears.

(iv) Statute of limitations.--A complaint under subparagraph (A)(i) shall be filed not later than 180 days after the date on which the violation occurs.

(v) Jury trial.--A party to an action brought under subparagraph (A)(ii) shall be entitled to trial by jury.

(3) Remedies.--

(A) In general.--An employee prevailing in any action under paragraph (2)(A) shall be entitled to all relief necessary to make the employee whole.

(B) Compensatory damages.--Relief for any action under subparagraph (A) shall include--

(i) reinstatement with the same seniority status that the employee would have had, but for the reprisal,

(ii) the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest, and

(iii) compensation for any special damages sustained as a result of the reprisal, including litigation costs, expert witness fees, and reasonable attorney fees.

(4) Rights retained by employee.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(5) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.--

(A) Waiver of rights and remedies.--The rights and remedies provided for in this subsection may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(B) Predispute arbitration agreements.--No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this subsection.

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

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

(b) Eligibility to file claim for award. (1) In general. Any individual, other than an individual described in

paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§ 301.7623-1 through 301.7623-4.

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

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

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

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

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

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

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

supporting evidence and identify their location to the best of the whistleblower's ability. If all available information known to the whistleblower is not provided to the IRS by the whistleblower, then the whistleblower bears the risk that this information might not be considered by the Whistleblower Office for purposes of an award.

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

(i) The date of the claim;

(ii) The whistleblower's name;

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

(iv) The whistleblower's date of birth;

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

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

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

(4) Perfecting claim for award. If a whistleblower files a claim for award that does not include information described under paragraph (c)(2) of this section, does not contain specific and credible information as described in paragraph (c)(1) of this section, or is based on information that was not submitted under penalty of perjury as required by paragraph (c)(3) of this section,

the Whistleblower Office may reject the claim or notify the whistleblower of the deficiencies and provide the whistleblower an opportunity to perfect the claim for award. If a whistleblower does not perfect the claim for award within the time period specified by the Whistleblower Office, then the Whistleblower Office may reject the claim. If the Whistleblower Office rejects a claim, then the Whistleblower Office will provide notice of the rejection to the whistleblower pursuant to the rules of § 301.7623-3(b)(3) or (c)(7). If the Whistleblower Office rejects a claim for the reasons described in this paragraph, then the whistleblower may perfect and resubmit the claim.

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

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

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

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

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JULY 29, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-80154-CIV-MARRA

DAVID E. STONE, KARI S. CARROLL
AS SURVIVING SPOUSE OF THOMAS CARROLL
AND DAVID C. DEPADRO,

Plaintiffs,

vs.

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Defendant.

July 28, 2022, Decided
July 29, 2022, Entered on Docket

KENNETH A. MARRA, United States District Judge.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION[1]

1. The Court presumes familiarity with its prior Orders.

Appendix B

This cause is before Plaintiffs' Motion for Reconsideration (DE 26). The Motion is fully briefed and ripe for review. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

On April 1, 2022, Defendant filed a motion to dismiss on several grounds, including lack of subject matter jurisdiction based on sovereign immunity and res judicata. (DE 10.) Plaintiffs' filed a cursory response to the merits of Defendant's arguments. (DE 19.) Plaintiffs' response also contained a request for leave to amend the Complaint to clarify that it sought to set aside Defendant's denial of Plaintiffs' Whistleblower claims. The Court granted Defendant's motion to dismiss for lack of subject matter jurisdiction and, alternatively, on res judicata grounds. With respect to Plaintiffs' request for leave to amend, the Court noted that it was improper for Plaintiffs to make this request in response to a motion to dismiss instead of filing a motion requesting leave to amend. The Court also concluded that leave to amend would be futile. (DE 24.)

Plaintiffs have now filed a motion for reconsideration on the basis of "clear error" and to "prevent manifest injustice." (DE 26.) Plaintiffs argue that the "Tax Court did not have jurisdiction to review Plaintiffs' appeals of their whistleblower denials and consequently res judicata does not bar Plaintiffs' claims under the APA." (DE 26 at 2.) Plaintiffs also argue that they are "properly pursuing their claim under the APA because there is not another adequate remedy of law to consider the inappropriate agency conduct that took place in the related Tax Court proceedings." (DE 26 at 5.) Next, Plaintiffs reassert that

sovereign immunity is waived and leave to amend should be granted. (DE 26 at 6-7.)

Courts have set forth three major grounds justifying reconsideration: "(1) an intervening change in controlling law; (2) the availability of new evidence and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering and Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004).

Furthermore, in reviewing a motion to reconsider, the Court "will not alter a prior decision absent a showing of 'clear and obvious error' where 'the interests of justice' demand correction." *Prudential Securities, Inc. v. Emerson*, 919 F. Supp. 415, 417 (M.D. Fla. 1996) (quoting *American Home Assurance, Co. v. Glenn Estess & Assoc. Inc.*, 763 F.2d 1237, 1239 n.2 (11th Cir. 1985)). A motion for reconsideration should not be used to reiterate arguments already made or to ask the Court to "rethink what the Court ... already thought through." *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). Nor should a motion for reconsideration be used to raise arguments that should have been made initially. *See O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992); *Prudential*, 919 F. Supp. at 417. Denial of a motion for reconsideration is "especially soundly exercised when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation." *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990). Finally, "reconsideration of a previous order is 'an extraordinary remedy, to be employed

sparingly.'" *Mannings v School Bd. of Hillsborough County*, 149 F.R.D. 235 (M.D. Fla. 1993).

Plaintiffs have not met the standard to justify this extraordinary relief. First, there was no reason that Plaintiffs could not have made these arguments in their response to the motion to dismiss. To the extent Plaintiffs claim that there is an intervening change of law based upon *Li v. Comm'r of Internal Revenue*, 22 F.4th 1014, 1016-17 (D.C. Cir. 2022), the Court rejects this argument. That case was decided in January of 2022, months before Defendant filed its motion to dismiss, and that case was cited by Defendant in its motion to dismiss (DE 10 at 9.)

Next, Plaintiffs' assertion that they can raise the issue of subject matter jurisdiction at any time does not justify reconsideration. Plaintiffs contend that the Tax Court had no subject matter jurisdiction, not this Court lacks subject matter jurisdiction, and that was an argument Plaintiffs ought to have made initially. Moreover, as Defendant points out, Plaintiffs cannot collaterally attack the Tax Court's jurisdiction in this case. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal."). Equally unavailing is Plaintiffs' reassertion that Defendant waived sovereign immunity.

Plaintiffs' request for leave to amend is also rejected. Rule 15 of the Federal Rules of Civil Procedure has no application after judgment is entered and "[p]ost-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6)." *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344-45 (11th Cir. 2010) (internal citations omitted).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Reconsideration (DE 26) is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 28th day of July, 2022.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JUNE 3, 2022

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-80154-CIV-MARRA

DAVID E. STONE, KARI S. CARROLL AS SURVIVING SPOUSE OF THOMAS CARROLL AND DAVID C. DEPADRO,

Plaintiffs,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Defendant.

June 2, 2022, Decided
June 3, 2022, Entered on Docket

KENNETH A. MARRA, United States District Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This cause is before the Court upon Defendant's Motion to Dismiss (DE 10). The Motion is fully briefed and ripe for review. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

Appendix C

I. Background

On January 31, 2022, Plaintiffs David E. Stone, Kari S. Carroll, as surviving spouse of Thomas Carroll, and David C. Depadro (collectively, "Plaintiffs") filed a Complaint (DE 1) against the United States of America on behalf of the Commissioner of Internal Revenue ("Defendant") seeking judicial review of a decision by the Internal Revenue Service ("IRS") not to pursue judicial or administrative proceedings based on their whistleblower information and the denial of their whistleblower claims. Plaintiffs bring their claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 to set aside the IRS's denial of their whistleblower claims, remand the claims to the IRS for further review, require the IRS to award Plaintiffs any whistleblower awards due, and award Plaintiffs reasonable attorney's fees and costs.

According to Complaint, Plaintiffs Carroll and Stone filed their whistleblower claims with the IRS in March of 2011. (Compl. ¶ 24A, Ex. A.) The claims concerned alleged tax avoidance based on multiple mortgage lenders' failure to qualify as real estate mortgage investment conduits (REMICs). *Id.* On February 1, 2016, the IRS denied their claims because no administrative or judicial action was taken based on the information they provided. (Compl. P 24H, Ex. F.) On February 26, 2016, Carroll and Stone sought a review of this denial in the United States Tax Court. (Compl. ¶ 24I, Ex. G.) The Tax Court granted the IRS's motion for summary judgment and found that Carroll and Stone were not entitled to whistleblower awards. (Compl. ¶ 24J, Exh. H.)

Appendix C

In March of 2021, a group of individuals, including Carroll, Stone and Depadro filed whistleblower claims with the IRS. (Compl. P25A, Ex. I.) The claims concerned Deutsche Bank's alleged tax avoidance by its failure to "properly quality as a real estate [mortgage] investment conduit (REMIC)." *Id.* On April 27, 2016, the IRS denied their claims because no administrative or judicial action was taken on the information provided. (Compl. ¶ 25D, Ex. L.) In August of 2016, Stone and Depadro challenged the IRS's decision in United States Tax Court. (Compl. ¶ 25E, Ex. L.) The Tax Court granted the IRS's motion to dismiss for failure to state a claim upon which relief can be granted and found that Stone and Depadro were not entitled to whistleblower awards. (Ex. M to Compl.) The Tax Court determined that, because the IRS did not act based on the information Stone and Depadro provided, and no tax proceeds were collected based on the information, the prerequisites for a whistleblower claim were not met. *Id.*

Defendant moves to dismiss the Complaint. Defendant contends that the United States has not waived its sovereign immunity for challenges to whistleblower claims in federal district court. With respect to the APA, Defendant states that the APA does not allow for judicial review of an agency action where there is another adequate remedy at law and does not allow for waiver for review of actions that Congress has committed to agency discretion. Defendant also argues that res judicata bars the suit because a prior court has already ruled on the same claims by the same parties.[1]

1. Defendant had moved to dismiss for insufficient service of process, but that motion is mooted by Defendant's agreement

Plaintiffs respond that res judicata does not apply because the same cause of action is not involved because each Plaintiff has a set of claims against the IRS premised on a different set of facts. Plaintiffs also claim that they are seeking a different remedy here; namely, that the agency's actions were arbitrary and capricious, which is different from the remedy sought from the IRS and Tax Court. With respect to sovereign immunity, Plaintiffs rely on section 702 of the APA and state that sovereign immunity does not apply because Plaintiffs are not seeking money damages.

In reply, Defendant points out that, although Plaintiffs attempt to characterize their claim as an APA challenge of IRS policy on REMICs, the Complaint clearly states that they are seeking review of the IRS's denial of their whistleblower notices under the APA. With respect to sovereign immunity, Defendant asserts that Plaintiffs did not respond to its arguments for dismissal on this basis, and instead just cited section 702 of the APA. Next, Defendant states that Plaintiffs improperly requested leave to amend the Complaint in the response to the motion to dismiss, as opposed to filing a motion seeking that relief. Lastly, Defendant contends that leave to amend should not be granted because it would be futile.

II. Legal Standard

Defendant moves to dismiss the Complaint pursuant to Rule 12(b)(1) and 12(b)(6). With respect to the motion

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to allow Plaintiff an extension of time to perfect service. (DE 21, 22, 23.)

to dismiss pursuant to Rule 12(b)(1),[2] as the Eleventh Circuit explained in *Lawrence v. Dunbar,* 919 F.2d 1525 (11th Cir.1990):

> Attacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms. "Facial attacks" on the complaint "require[ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." "Factual attacks," on the other hand, challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered."

Id. Here, the Defendant's attack is facial in nature; so, as with a motion to dismiss pursuant to 12(b)(6), the allegations in the Complaint are taken as true.

With respect to a motion to dismiss pursuant to 12(b)(6), Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation

2. "[A] dismissal on sovereign immunity grounds should be pursuant to Rule 12(b)(1) because no subject-matter jurisdiction exists." *Thomas v. U.S. Postal Service,* 364 F. Appx. 600, 601 n.3 (11th Cir. 2010).

to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. When considering a motion to dismiss, the Court must accept all of the plaintiff's allegations as true in determining whether a plaintiff has stated a claim for which relief could be granted.

III. Discussion

"The tax whistleblower program was established to reward individuals who inform on taxpayers engaged in tax fraud. The primary purpose of this program is to reduce the tax gap and adequately motivate whistleblowers to disclose information." Sharon Kaur, *Tax Tattletales Hit the Jackpot: Now What?*, 32 Hastings Women's L.J. 89, 94 (2021).

Appendix C

The tax whistleblower statute, 26 U.S.C. § 7623, provides in pertinent part:

> a) **In general**.--The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—
>
> (1) detecting underpayments of tax, or
>
> (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.
>
> (b) **Awards to whistleblowers.—**
>
> (1) In general.--If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the

Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) **Award in case of less substantial contribution.—**

(A) **In general**.--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

. . . .

> (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).

Id.

The Court must address first Defendant's sovereign immunity argument, as it relates to this Court's subject matter jurisdiction. *See Omnipol, A.S. v. Multinational Def. Servs., LLC,* 32 F.4th 1298, 2022 WL 1311596, at *4 (11th Cir. 2022) (affirming district court for dismissing claims for lack of subject matter jurisdiction when claims are barred by sovereign immunity); *Govern v. Meese,* 811 F.2d 1405, 1408 (11th Cir. 1987) (when suit is barred by sovereign immunity, federal courts do not have subject matter to settle the dispute).

The United States has sovereign immunity from lawsuits unless Congress explicitly waives that immunity. *Lehman v. Nakshian,* 453 U.S. 156, 160-61, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981) ("the United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (internal quotation marks and ellipses omitted); *Lane v. Pena,* 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"). A waiver of sovereign immunity must be strictly construed,

in terms of scope, in favor of the sovereign. *Lane,* 518 at 192. "If sovereign immunity applies, a court lacks subject matter jurisdiction to consider a claim." *Foster Logging, Inc. v. United States,* 973 F.3d 1152, 1157 n.3 (11th Cir. 2020) (citing *Zelaya v. United States,* 781 F.3d 1315, 1322 (11th Cir. 2015)).

The APA's sovereign immunity waiver provides in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States[.]

5 U.S.C. § 702.

The APA provides for judicial review of a final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "An adequate remedy does not mean identical relief or even that relief is possible for a particular plaintiff." *Montgomery v. Internal Revenue Serv.,* 330 F. Supp. 3d 161, 172 (D.D.C. 2018). "[A]n alternative remedy is 'adequate' . . . [when there is] 'legislative intent' to

create a special, alternative remedy and thereby bar APA review." *Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.*, 846 F.3d 1235, 1244, 427 U.S. App. D.C. 333 (D.C. Cir. 2017); *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cty. Texas,* 6 F.4th 633, 642 (5th Cir. 2021) (same). Congress did not intend for the APA to duplicate existing procedures for review of agency action. *Bowen v. Massachusetts,* 487 U.S. 879, 903, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988).

Significantly, the Tax Court has exclusive jurisdiction over section 7623(b)(3). *See Mandy Mobley Li v. Comm'r,* 22 F.4th 1014, 1017, 455 U.S. App. D.C. 264 (D.C. Cir. 2022) ("Subsection (b)(4) of § 7623 gives the Tax Court exclusive jurisdiction over only a "determination regarding an award" under subsections (b)(1)-(3)."); *Meidinger,* 989 F.3d at 1358 ("the Tax Court has exclusive jurisdiction over claims based on § 7623"). Further, the United States Courts of Appeals have exclusive jurisdiction to review the decisions of the Tax Court. 26 U.S.C. § 7482(a); *see Meidinger v. Comm'r of Internal Revenue,* 662 F. App'x 774, 775 (11th Cir. 2016) ("The claimant may appeal the Tax Court's decision to the applicable United States Circuit Court of Appeals, not the district court.") Thus, there is no right to appeal to this Court. The question then becomes whether the APA allows for a judicial review of an agency action.

In *Norvell v. Sec'y of Treasury,* the district court of Iowa determined that section 7623 provides an adequate remedy that bars APA review. In doing so, it pointed out that the plaintiff was provided a review of his claim

in a court of competent jurisdiction. *Norvell v. Sec'y of Treasury,* No. 1:18-CV-251-BLW, 2019 U.S. Dist. LEXIS 1523, 2019 WL 96218, at *3 (D. Idaho Jan. 3, 2019), *aff'd sub nom. Norvell v. Sec'y of the Treasury,* 821 F. App'x 853 (9th Cir. 2020); *see also Citizens for Responsibility,* 846 F.3d at 1245 (finding that the Freedom of Information Act provided an adequate remedy to compel the government agency to meet its disclosure requirements, noting "no yawning gap between the relief FOIA affords and the relief [sought] under the APA.") In fact, the *Norvell* court, relied upon the Eleventh Circuit case of *Medinger supra,* in noting that "other federal courts have consistently dismissed attempts to challenge IRS inaction under § 7623 for lack of jurisdiction." *Norvell,* 2019 U.S. Dist. LEXIS 1523, 2019 WL 96218 at * 3 (citing *Medinger,* 662 F. App'x at 776). Thus, the Court finds that section 7623 provides an adequate remedy that bars APA review as it permits Plaintiffs to seek review in Tax Court, of which Plaintiffs availed themselves. As such, the Complaint is dismissed for lack of subject matter jurisdiction.[3]

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3. Plaintiffs' only argument regarding subject matter jurisdiction is that sovereign immunity is waived under 5 U.S.C. § 702. Significantly, Plaintiffs do not discuss any of Defendant's arguments or provide the Court with any caselaw in support of its position. Instead, Plaintiffs ask to amend the Complaint to make clear that it is seeking to set aside the IRS's prior denials of Plaintiffs' whistleblower claims. (Resp. at 3.) It is, however, improper to make this request in response to a motion to dismiss instead of filing a motion requesting leave to amend. *Rosenberg v. Gould,* 554 F.3d 962, 967 (11th Cir. 2009) (affirming the denial of a motion to amend when the plaintiff did not file a motion to amend with a copy of the amendment or the substance of the amendment but moved to amend in a brief opposing the motion to dismiss). In

Appendix C

Although the Court is dismissing this case for lack of subject jurisdiction, the Court will nonetheless address Defendant's argument that this case should be dismissed for failure to state a claim on the basis of res judicata. Before discussing the elements of res judicata, the Court first observes that res judicata is an affirmative defense that should be raised under Rule 8(c), rather than Rule 12(b). *Concordia v. Bendekovic,* 693 F.2d 1073, 1075 (11th Cir. 1982). A party, however, may raise the defense on a motion to dismiss "where the defense's existence can be judged on the face of the complaint." *Id.* Here, the Complaint thoroughly discusses the parties, past cases and includes attached copies of relevant decisions. *Harrell v. Bank of Am., N.A.,* 813 F. App'x 397, 402 (11th Cir. 2020) ("It was proper for the defendants to raise the defense of res judicata in their motions to dismiss because its applicability was apparent from the face of the. . . complaint and the documents the district court was allowed to consider.") Furthermore, Plaintiffs do not raise any objections to addressing the res judicata defense at this stage in the proceedings.

To prevail on this defense, Defendant must establish that: "1) the prior judgment must have been a final judgment on the merits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *Batchelor-Robjohns v. United*

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any event, as the next section will discuss, any amendment to the Complaint would be futile.

States, 788 F.3d 1280, 1285 (11th Cir. 2015). With respect to the first three elements, Plaintiffs do not dispute that Defendant has met these requirements. Plaintiffs only object on the ground that the same cause of action is not involved. Nonetheless, for the purposes of a complete record, the Court will briefly address the elements that are not in dispute.

First, the Court concludes that the two Tax Court decisions, one granting summary judgment for the IRS and the other granting the IRS's motion to dismiss,[4] and which found that Plaintiffs were not entitled to whistleblower awards, are final judgments. *See Solis v. Glob. Acceptance Credit Co., L.P.,* 601 F. App'x 767, 771 (11th Cir. 2015) (dismissal of the complaint for failure to state a claim operated as a final judgment on the merits for res judicata purposes); *Bazile v. Lucent Techs.,* 403 F. Supp. 2d 1174, 1181 (S.D. Fla. 2005) ("A judgment rendered upon a motion for summary judgment is a final judgment on the merits and is entitled to the full preclusive effect of any final judgment.') (citing *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.,* 517 F.2d 110 (5th Cir.1975)).[5]

4. Exs. H and M, attached to the Compl.

5. The decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Second, the Tax Court had jurisdiction over Plaintiffs' claims. *See* 26 U.S.C. § 7623(b)(4) ("Any determination regarding an award . . . may . . . be appealed to the Tax Court and the Tax Court shall have jurisdiction with respect to such matter."); *Meidinger v. United States,* 989 F.3d 1353, 1358 (Fed. Cir.), *cert. denied,* 142 S. Ct. 104, 211 L. Ed. 2d 29 (2021), *reh'g denied,* 142 S. Ct. 634, 211 L. Ed. 2d 392 (2021) (holding that the Tax Court has exclusive jurisdiction over claims based on § 7623).

Third, the parties in the Tax Court case are the same, except that Kari Carroll is appearing as a representative of her deceased husband Thomas Carroll, one of the original Tax Court claimants. But Kari Carroll is in privity with her deceased husband, Thomas Carroll, and that is sufficient to establish identity of the parties. *See Gonzalez v. Fannie Mae,* 860 Fed. Appx. 693, 694 n.3 (11th Cir. 2021) (quoting *Stogniew v. McQueen,* 656 So. 2d 917, 920 (Fla. 1995)) ("For one to be in privity with one who is a party to a lawsuit one must have an interest in the action such that she will be bound by the final judgment as if she were a party.") (ellipses omitted).

The last requirement is satisfied if the prior judgment is based on the same facts alleged here. As discussed by the Eleventh Circuit in *Ragsdale v. Rubbermaid, Inc.,* 193 F.3d 1235, 1239 (11th Cir. 1999):

> The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes

> of action are the same, a court must compare the substance of the actions, not their form. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of res judicata.

Id. (citations, quotation marks and parentheticals omitted).

Both cases, the ones filed in Tax Court and the instant case, seek the same relief; namely, an order that the IRS must investigate the information provided by Plaintiffs and provide monetary awards for information provided to the IRS. Moreover, the cases also dispute the IRS's decision not to act on the whistleblower tips. Plaintiffs, however, state that "each Plaintiff had a set of claims against the IRS that were premised on a *different* set of facts." (Resp. at 2) (emphasis in original). Plaintiffs do not expand on this argument or highlight these different facts. Rather, Plaintiffs state that "each Plaintiff is seeking this Court's review of the IRS's failure to engage in reasoned decision-making and thus, a cause of action under the APA is the proper avenue upon which Plaintiffs must travel." (Resp. at 2.) In essence, this argument contends not that there are factual differences between the Tax Court cases and the instant case, but that the legal claims differ. This runs contrary to Eleventh Circuit precedent which places the focus on the factual predicate of the former action when determining whether res judicata applies. *See Batchelor-Robjohns,* 788 F.3d at 1286 ("even if the rights

and duties at issue are distinct, where a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, the two cases constitute the same claim or cause of action for purposes of res judicata.").[6]

For the foregoing reasons, the Court dismisses the Complaint for lack of subject matter jurisdiction and, alternatively, for failure to state a claim upon which relief can be granted. The Court also finds that any amendment would be futile. *See Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262-63 (11th Cir. 2004) ("[A] district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile.").

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss (DE

6. Collateral estoppel would also bar this claim. Collateral estoppel "forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *Islam v. Secretary, Department of Homeland Security,* 997 F.3d 1333, 1341 (2021) (quoting *CSX Transp., Inc. v. Brotherhood of Maint. of Way Emps.,* 327 F.3d 1309, 1317 (11th Cir. 2003)). "[T]he relevant issue must be identical to the one involved in the prior proceeding, (2) the issue must have been actually litigated in the prior proceeding, (3) the determination of the issue must have been a critical and necessary part of the judgment in the prior proceeding, and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Id.* Here, the Tax Court determined that Plaintiffs were not entitled to whistleblower awards.

10) is **GRANTED**. The case is dismissed without prejudice for lack of subject matter jurisdiction. *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (dismissal for lack of subject matter jurisdiction is entered without prejudice). Alternatively, the case is dismissed with prejudice for failure to state a claim upon which relief can be granted.

The Court will separately issue a judgment.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 2nd day of June, 2022.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

APPENDIX D — STATUTES

Title 5

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by

them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;1 and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Appendix D

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Appendix D

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Appendix D

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Appendix D

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing

court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix D

Title 26

§ 860A. Taxation of REMIC's

(a) General rule.--Except as otherwise provided in this part, a REMIC shall not be subject to taxation under this subtitle (and shall not be treated as a corporation, partnership, or trust for purposes of this subtitle).

(b) Income taxable to holders.--The income of any REMIC shall be taxable to the holders of interests in such REMIC as provided in this part.

Appendix D

§ 860D. REMIC defined

(a) General rule.--For purposes of this title, the terms "real estate mortgage investment conduit" and "REMIC" mean any entity--

(1) to which an election to be treated as a REMIC applies for the taxable year and all prior taxable years,

(2) all of the interests in which are regular interests or residual interests,

(3) which has 1 (and only 1) class of residual interests (and all distributions, if any, with respect to such interests are pro rata),

(4) as of the close of the 3rd month beginning after the startup day and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments,

(5) which has a taxable year which is a calendar year, and

(6) with respect to which there are reasonable arrangements designed to ensure that--

(A) residual interests in such entity are not held by disqualified organizations (as defined in section 860E(e)(5)), and

(B) information necessary for the application of section 860E(e) will be made available by the entity.

In the case of a qualified liquidation (as defined in section 860F(a)(4)(A)), paragraph (4) shall not apply during the liquidation period (as defined in section 860F(a)(4)(B)).

(b) Election.--

(1) In general.--An entity (otherwise meeting the requirements of subsection (a)) may elect to be treated as a REMIC for its 1st taxable year. Such an election shall be made on its return for such 1st taxable year. Except as provided in paragraph (2), such an election shall apply to the taxable year for which made and all subsequent taxable years.

(2) Termination.--

(A) In general.--If any entity ceases to be a REMIC at any time during the taxable year, such entity shall not be treated as a REMIC for such taxable year or any succeeding taxable year.

(B) Inadvertent terminations.--If--

(i) an entity ceases to be a REMIC,

(ii) the Secretary determines that such cessation was inadvertent,

(iii) no later than a reasonable time after the discovery of the event resulting in such cessation, steps are taken so that such entity is once more a REMIC, and

(iv) such entity, and each person holding an interest in such entity at any time during the period specified pursuant to this subsection, agrees to make such adjustments (consistent with the treatment of such entity as a REMIC or a C corporation) as may be required by the Secretary with respect to such period,

then, notwithstanding such terminating event, such entity shall be treated as continuing to be a REMIC (or such cessation shall be disregarded for purposes of subparagraph (A)) whichever the Secretary determines to be appropriate.

Appendix D

§ 7623 Expenses of detection of underpayments and fraud, etc.
(excerpted (a) and (b) only)

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

(1) detecting underpayments of tax, or

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

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

(b) Awards to whistleblowers.--

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

proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

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

(A) In general.--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of

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

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

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

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

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

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

(6) Additional rules.--

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

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

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