

UNITED STATES TAX COURT

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

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S OBJECTION AND  
RESPONSE TO RESPONDENT'S MOTION TO DISMISS

AMICUS CURIAE THE FERRARO LAW FIRM, on behalf of hundreds of whistleblowers who are similarly situated to Petitioner, having made submissions of information to the Internal Revenue Service ("IRS") pursuant to Internal Revenue Code section 7623(b), hereby submit an amicus curiae brief in support of Petitioner's objection to Respondent's motion to dismiss in the above captioned matter.

- I. **When the IRS refuses to issue a whistleblower award determination, despite having "collected proceeds" within the meaning of section 7623(b), it is the same as having made a negative award determination that is reviewable by the Tax Court under Cooper.**

Petitioner brings what we believe is an issue of first impression to the Tax Court with respect to whistleblower actions. Simply put, the novel issue before the Court is whether the Tax Court has subject matter jurisdiction on an

appeal of a petitioner under the provisions of section 7623(b) if the IRS fails to issue an award determination to the petitioner pursuant to that section. This issue is the next logical extension of the holdings by the Tax Court in Cooper v. Commissioner, 135 T.C. No. 4 (2010) and Kasper v. Commissioner 137 T.C. 4 (2011), in which the Tax Court held that it had subject matter jurisdiction to hear appeals of award determinations under section 7623(b) when there has been a formal denial of an award by the IRS, because a denial of an award is itself a "determination." We say that the issue presented in this matter is a logical extension of those holdings because a "denial of an award" can be effectuated many ways other than the way it was done in Cooper - by sending a formal denial letter - including merely ignoring the claimant all together, and that those forms of denying a whistleblower award should also confer the same appeal rights to the whistleblower that a letter printed on paper confers.

Petitioner's position can be summed up succinctly as: when the IRS has already collected money from the taxpayer you turned in to them, no award determination equals a negative determination. The failure to decide is in certain circumstances itself a

decision, or as modern day lyricist Neil Peart wrote, "If you choose not to decide, you still have made a choice."<sup>1</sup>

Petitioner has alleged that the IRS has collected some proceeds as a result of the information he provided in conjunction with an IRS Form 211 *Application For Award For Original Information*, and that many months have passed since some of those proceeds were collected by the government pursuant to final settlement agreements with several of the taxpayers to which that information related. However, despite the existence of collected proceeds and final resolutions of the taxpayers' years at issue, the IRS has not been forthcoming with any award determination for the Petitioner. Petitioner thus finds himself in a quagmire. Neither section 7623(b), nor the Treasury Regulations there under, nor the award determination procedures of Internal Revenue Manual section 25.2.2.8 impose a deadline on the IRS for making an award determination once it has collected proceeds from a taxpayer who was the subject of the information

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<sup>1</sup>Rush, *Freewill* on PERMANENT WAVES (Mercury Records 1980). Perhaps a more fitting yet somber quote can be taken from Japanese Prime Minister Kantarō Suzuki "The only thing to do is just kill it with silence (*mokusatsu*)," in response to the July 26, 1945 Potsdam Declaration by the Allied Forces in World War II. In that instance, the Allies interpreted Japan's ignoring of the Declaration as itself a negative response to their request for surrender, indeed a *de facto* determination with dire consequences.

provided by the whistleblower. Section 7623(b)(4) does however impose on a petitioner a 30 day deadline for filing an appeal in Tax Court after the Whistleblower Office makes an award determination under this section. The core of the problem here is that as a procedural matter IRS imposes no deadline on itself for making an award determination after it has collected proceeds from a taxpayer based on a whistleblower's information. There are literally no internal rules for the timely processing of award determinations, so the IRS could technically delay for 100 years the issuance of an award determination without violating any of their own rules or guidelines.

We understand that the Tax Court is a court of limited jurisdiction which requires a statutory basis to find that it has jurisdiction, and that the Tax Court is without authority to enlarge upon that statutory grant.<sup>2</sup> While Cooper dealt with the question of whether an award denial letter was a determination that conferred jurisdiction on the Court under section 7623(b)(4), no case under this section has yet been before the

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<sup>2</sup>See Judge v. Commissioner, 88 T.C. 1175, 1180-1181 (1987); and Phillips Petroleum Co. v. Commissioner, 92 T.C. 885, 888 (1989). However, the Tax Court nevertheless has jurisdiction to determine whether or not it has jurisdiction. See Hambrick v. Commissioner, 118 T.C. 348 (2002); Pyo v. Commissioner, 83 T.C. 626, 632 (1984); Kluger v. Commissioner, 83 T.C. 309, 314 (1984).

Tax Court in which the IRS's failure to act is argued to be a determination. We further understand that the IRS's failure to act has been analyzed by this Court in other sections of the Internal Revenue Code to see whether such inaction was itself a determination. For example, this Court has previously held that where it is given statutory authority to hear appeals of IRS interest abatement "determinations," it won't hear an appeal unless a "formal determination" is made by the IRS. See Gilmer v. Commissioner, T.C. Memo. 2009-296. In Gilmer, the taxpayer was appealing, among other things, the IRS's failure to abate interest. Under section 6404(e)(1), the IRS "may" abate interest & penalties, but does not have to. Section 6404(h) grants the Tax Court jurisdiction to review the IRS's failure to abate interest if an action is brought within 180 days after the mailing of the IRS's final determination not to abate such interest. The IRS simply did not respond to Gilmer's request for abatement, and the Court held that the failure of the IRS to make a formal determination meant that the Court did not yet have jurisdiction under section 6404(h) to hear petitioner's appeal.

Compare the statute at issue in Gilmer with the statute at issue in this matter - section 7623(b) - and a key distinguishing feature appears. Appeals filed under section 6404(h) have an

"abuse of discretion" standard, because the IRS is simply not required by statute to make a determination. Under section 7623(b), however, the Court is following the mandate of section 7623(b)(1) which requires that if the IRS proceeds with an administrative or judicial action based on the information provided by a whistleblower, the IRS "shall" pay an award to a whistleblower from the proceeds it collects based on that information. The IRS does not have the "discretion" to issue an award under section 7623(b), akin to the discretion it has to abate interest under section 6404(e)(1). Similarly, when a taxpayer makes a request for a determination letter pursuant to Revenue Procedure 2012-1, 2012-3, or 2012-7, the IRS is not required by statute to make such a determination. Because taxpayers making such requests have no right to a determination as a matter of law, it makes sense that if the IRS simply ignores those requests, they have not impinged on the rights of the requesting taxpayer. However, when a whistleblower makes a request for a timely determination under section 7623(b) after proceeds have been collected by the IRS, as Petitioner has done in this matter, they are not asking the IRS to make a discretionary determination, they are asking for the IRS to timely make a determination that is required by statute.

The Court's jurisdiction to hear whistleblower award determination appeals under section 7623(b) is also distinguishable from the Court's jurisdiction to hear appeals of deficiency determinations under section 6213. In a deficiency matter, the IRS has asserted that a taxpayer owes monies to the government, and the statute clearly sets forth that the jurisdiction of the Court applies only after the Notice of Deficiency that meets the requirements of section 6212 is sent to the taxpayer, and clearly sets forth the time for filing a petition to this Court. If the taxpayer was not subject to any additional assessment, (or if the IRS simply makes a mistake) he would not receive a Notice of Deficiency, and thus the failure of the IRS make a formal written determination on a Letter 531 Notice of Deficiency within the applicable period of limitations under section 6501 et. sec. has not impinged on the taxpayer's right to appeal a deficiency determination because the IRS did not pursue the assessment.<sup>3</sup> Compare that with a whistleblower

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<sup>3</sup>See also the mitigation provisions of section 1311. Under this section, a "determination" of the IRS or this court, as defined for purposes of the part of the Internal Revenue Code containing section 1313, can be corrected by an adjustment in the manner specified by section 1314. However, each of the defined parts of a "determination," as defined by section 1313, again carry their own timelines for IRS determinations so that the IRS cannot assess tax on a taxpayer without the taxpayer being given the opportunity to appeal the IRS determination. In each of these instances, the taxpayer's rights to appeal are protected

case under section 7623(b), wherein the IRS would clearly be impinging on a whistleblower's right to an award under section 7623(b) by simply refusing to make an award determination. It could be said that the statutory timelines for the Court's jurisdiction to apply in a deficiency matter allow the Court to protect the rights and interests of both parties, but in a whistleblower matter the statutory timelines do not adequately protect the appeal rights of the whistleblower if the Court's jurisdiction is based on the IRS making a written determination. Therefore, the Court should consider the rights of the whistleblower to an appeal when considering exactly what constitutes a "determination" of the Respondent within the meaning of section 7623(b)(4).

When Respondent has failed to issue a written award determination to a whistleblower despite the existence of collected proceeds within the meaning of Treas. Reg. section 301.7623-1, then the Respondent has made a *de facto* award determination. As this Court said in Cooper, "Accordingly, we find that our jurisdiction is not limited to the amount of an award determination but includes any determination to deny an

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when the IRS fails to act, therefore cases relating to the mitigation provisions are also distinguishable from whistleblower cases where the IRS fails to issue a written determination.



award." Id., at 9. This negative *de facto* award determination, which acts to deny an award to Petitioner, is "any determination" under 7623(b)(4), and the refusal of the IRS to send Petitioner a piece of paper should not allow the Respondent to quash the jurisdiction of the Court.

**II. It is a matter of public record that proceeds, within the meaning of Treasury Regulation section 301.7623-1, were collected by the IRS from at least two of the taxpayers about which Petitioner made his submissions.**

Petitioner has alleged that Newell Rubbermaid and General Mills, among other entities, participated in tax avoidance transactions that were facilitated by his former employer, Rabobank.

Publically available Form 10-K Annual Reports that these two entities have filed with the Securities and Exchange Commission have respectively disclosed that they were both audited by the IRS and settled disputes with the IRS with respect to transactions and periods which appear to be identical to those reported to the IRS by Petitioner. Specifically, Newell Rubbermaid disclosed that it settled its 2005 and 2006 United States federal income tax return examinations in 2010. Newell Rubbermaid, Inc., 2010 10-K Annual Report 79 (2011). General Mills disclosed that it paid \$17.6 million in its 2009 fiscal year in connection to the IRS audits for the 2004 to 2006 fiscal years. General Mills, Inc. 2010 10-K Annual Report 91 (2010).

During fiscal year 2011, General Mills and the IRS reached a settlement concerning certain corporate income tax adjustments for the 2002 through 2008 fiscal years and General Mills made payments totaling \$385.3 million in fiscal year 2011 related to the settlement. General Mills, Inc. 2010 10-K Annual Report 77 (2011).

It has been more than eleven months from the date of these public disclosures of payment by at least two taxpayers who underlie this petition, and yet no award determination has been forthcoming for Petitioner. Petitioner has also made a request for a timely award determination after that financial disclosure information, and still no award determination was made. For purposes of Respondent's motion to dismiss currently before this Court, the Court need not find that any of these disclosures necessarily mean that it was Petitioner's information which substantially contributed to the IRS's administrative action against those taxpayers, which would thereby entitle Petitioner to an award under section 7623(b). Rather, these disclosures merely demonstrate to the Court that it is reasonable to believe that Petitioner's information may have led to the collection of proceeds within the meaning of Treas. Reg. section 301.7623-1. Petitioner should be allowed to commence discovery to determine to what extent his information was utilized as part of the IRS

investigations that led to the collection of taxes from these three taxpayers, and potentially other taxpayers that were part of the same submission to the IRS.

Internal Revenue Manual ("IRM") Section 25.2.2.7 (06-18-2010) *Processing of the Form 211 7623(b) Claim for Award*, describes the administrative procedure the IRS must undertake to make an award determination. This procedure, even assuming a complex tax return is involved, should take a couple months at most to complete before the whistleblower is contacted about their preliminary award determination. No part of this procedure appears to be lengthy, nor should there be any drawn out award approval process because the authority to make an award determination ultimately rests in one person, the Director of the Whistleblower Office. However, neither this IRM procedure, nor the amended award determination procedures which were released on June 7, 2012 (WO-25-0612-01) that are scheduled to take effect on August 1, 2012, contain any actual timeline for the IRS or the Director of the Whistleblower Office to make an award determination.

Where the Respondent has collected proceeds from a taxpayer, and that taxpayer's dispute with the IRS has come to a final conclusion, then Respondent makes a determination by either

sending a letter to a whistleblower or by failing to send a letter to a whistleblower within a reasonable time. In this instance, the IRS has failed to send a letter within a reasonable time of the conclusion of the tax periods of, and collection of proceeds from, at least two of the taxpayers who underlie Petitioner's claims. Therefore, the IRS has made a *de facto* award determination in this matter.

**III. An affidavit by the Director of the IRS Whistleblower Office that a claim is "still pending" does not go far enough to establish that there is a reasonable basis for the IRS not yet making a written award determination in the face of collected proceeds.**

In support of Respondent's motion to dismiss the Respondent submitted an affidavit of IRS Whistleblower Office Director Stephen Whitlock which simply states that the claim is "still pending." See Exhibit A to Respondent's Motion to Dismiss for Lack of Jurisdiction, paragraph 5. The Court should find that an affidavit which merely states that a claim under section 7623(b) is "still pending" is insufficient as a matter of law when there is a showing by Petitioner that proceeds have in fact been collected by the IRS.

When crafting the affidavit in this matter, the IRS may have been concerned that they were prohibited from saying anything about the taxpayers at issue or the status of Petitioner's

claim, fearing that such a disclosure would violate section 6103 or section 7431 because it would contain confidential information about the taxpayers at issue in this matter. However, because the matter before the Court is a judicial proceeding, section 6103(h)(4) would permit the IRS to make such a disclosure as is necessary to determine if Petitioner was in fact entitled to an award under section 7623(b). Assuming that the IRS is aware of the judicial proceeding exception in section 6103(h), they must have weighed this exception against the provisions of section 7431 and concluded that:

- (i) the minimal statement in the affidavit that the claim was "still open" would be enough to satisfy the Court that the jurisdictional threshold of section 7623(b)(4) had not been met, so that would lead to a quick dismissal of the case; and
- (ii) they have no restrictions on their ability to delay making an award determination even when they have already collected proceeds, so they can keep an whistleblower claim open *ad infinitum*; or
- (iii) they are going to deny Petitioner's award claim but they simply haven't gotten around to it yet.

With respect to rationale (iii), it appears from the statements of IRS Whistleblower Office officials who were quoted in the petition (See Pet. paragraphs 2, 4, et. al.) that the IRS intends to deny Petitioner's claim for an award. Indeed, it appears that decision has already been made. (See Pet. Paragraph 4(o)). Just as there is no procedural, statutory, or regulatory timeline for making positive award determinations under section 7623(b), there is no timeline for making negative award determinations. If the IRS has decided not to issue an award to Petitioner in November 2011, as Petitioner alleges, it is unconscionable that more than seven months later the IRS has still not yet issued a written award denial so that Petitioner could file his appeal with certainty that the Tax Court would have jurisdiction to hear it. To fail to act in this instance is particularly malicious, because it serves only one purpose: to deny Petitioner his right to an appeal before this Court.

If there is some reason - legitimate or otherwise - that the matter is "still pending" because the IRS believes that the matter is not yet ripe for an award determination, the IRS should have stated that reason in the affidavit so that Petitioner and this Court can be certain that the Petitioner's rights have not been violated. If the IRS said in the affidavit: "We are intentionally not making an award

determination to avoid the jurisdiction of the United States Tax Court over the denial of an award claim." - would this Court agree that they have jurisdiction over what is clearly a *de facto* award denial determination?

**Conclusion:**

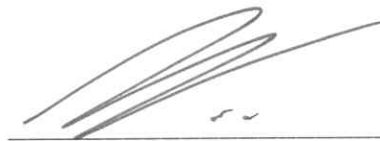
The Petitioner should be allowed to continue forward with discovery to determine why his formal award determination has not been issued and to gather the necessary information for this Court to make such a determination in the absence of any calculation by the IRS.

If the Court determines that it does not yet have jurisdiction because the IRS has failed to issue the IRS a written award determination within a reasonable time period of collecting proceeds, then the only explanation is that section 7623(b) is deficient in its construction because it does not impose a deadline for the IRS to make an award determination, and that the Court is powerless to find that the IRS's failure to act can itself be a "determination" in certain instances. We believe that the Court has the power to invoke subject matter jurisdiction over a *de facto* determination when the IRS has weighed the Petitioner's 5<sup>th</sup> Amendment due process rights against its administrative preferences and decided not to issue a

written award determination. The Court should, in the absence of a legitimate stated reason for not yet making an award determination in this matter, deny Respondent's motion to dismiss.

Date:

Respectfully Submitted,



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