

UNITED STATES TAX COURT

ANONYMOUS 1, and	)	
ANONYMOUS 2,	)	
	)	
PETITIONERS,	)	
	)	
	)	
v.	)	Docket No. 12472-11W
	)	
	)	JUDGE FOLEY
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
RESPONDENT.	)	
	)	

**PETITIONERS' REPLY TO RESPONDENT'S RESPONSE TO PETITIONERS'  
MOTION TO VACATE JUDGMENT UNDER TAX COURT RULE 162**

Petitioners, Anonymous 1 and Anonymous 2, by and through Counsel, and pursuant to Tax Court Rules 50 and 162, hereby REPLY to Respondent's Response to Petitioners' Motion To Vacate Decision under Tax Court Rule 162 filed on January 24, 2013, pursuant to the Court's Orders dated December 10, 2012 and December 19, 2012.

IN SUPPORT THEREOF, PETITIONERS respectfully state as follows:

1. On or about July 22, 2009, Petitioners, Anonymous 1 and Anonymous 2 filed two (2) Form 211, "Application for Award for Original Information," in one (1) package with information attached, one (1) Form 211 under each Petitioners' name.
2. On April 26, 2011, Respondent issued, to each Petitioner, a letter indicating that it failed to collect any amounts on Petitioners' Whistleblower Claim.

Electronically filed on February 25, 2013,  
*/s/ Thomas C. Pliske*, Tax Court Bar PT0140

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3. On May 26, 2011, Petitioners' filed a petition in this Court and accompanying documentation, together with their Motion to File Petition for Whistleblower Action under Code Section 7923(b)(4) Under Seal and Anonymously. Petitioners' motion request that the Court to Permit the Petitioners to file their Petition under seal and to proceed anonymously.

4. On August 8, 2011, Respondent filed its Answer in this case.

5. On September 16, 2011, Respondent filed its motion for summary judgment and declaration of attorney Ashley M. Bender.

6. On October 19, 2011, Petitioners filed their Response to Respondent's Motion for Summary Judgment.

7. On August 17, 2012, Respondent filed its Status Report with the Court notifying the Court that a division of Respondent was conducting a promoter investigation on the Taxpayer identified by Petitioners in their whistleblower claim. Additionally, Respondent stated that the Respondent was currently considering using Petitioners' information in its on-going promoter investigation.

8. On November 2, 2012, the Court granted Respondent's Motion for Summary Judgment.

9. On November 20, 2012, Petitioners filed their Motion for Reconsideration under Tax Court Rule 161, which the Court has treated Petitioners' Motion as a Motion to Vacate Decision under Tax Court Rule 162.

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10. On January 24, 2013, Respondent, pursuant to this Court's Order dated December 10, 2013, filed its response to Petitioners' Motion to Vacate Decision under Tax Court Rule 162.

11. On or about February 4, 2013, Petitioners received a letter, as reflected in Exhibit A, from Respondent's Whistleblower Office in which Respondent stated that it had re-opened Petitioners' Whistleblower Claim. Exhibit A reflects the letter sent by Respondent to Anonymous 2. Anonymous 1 would have received a similar letter.

**REPLY**

12. As stated in Respondent's Response filed on January 24, 2013, the Court has relied upon Federal Rules of Civil Procedure (FRCP) 60 in resolving issues under Tax Court Rule 162. See DeNaples v. Commissioner, T.C. Memo. 2011-46 at \*5 (Citing Cinema '84 v. Commissioner, 122 T.C. 264(2004)), aff'd, 412 F.3d 366 (2d Cir. 2005); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999,1001 (1978); Kun v. Commissioner, T.C. Memo. 2004-273.

13. The grounds for relief under FRCP 60 include: (a) Mistake, (b) Newly discovered evidence that could not have been discovered with reasonable diligence, and (c) "any other reason that justifies relief." See FRCP 60(b)(1), (2) and (6). See also DeNaples v. Commissioner, T.C. Memo. 2011-46. Additionally, relief under FRCP 60(b)(6) requires a showing of exceptional or extraordinary circumstance. See Ackermann v. United States, 340 U.S. 193, 202 (1950); Salazar v. District of Columbia, 633 F.3d 1110, 119-1122 (D.C. Cir. 2011); DeNaples v. Commissioner, T.C. Memo. 2011-46.

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14. In this case, both newly discovered evidence which could not have been discovered with reasonably diligence (FRCP 60(b)(2)) and prevention of the miscarriage of justice (by prevention of the application of res judicata (FRCP 60(b)(6))) require that this Court vacate its order dated November 2, 2012 granting Respondent's Motion for Summary Judgment.

**NEWLY DISCOVERED EVIDENCE**

15. As stated by Petitioners in their transmuted Motion for Reconsideration under Tax Court Rule 161 to its Motion to Vacate Decision under Tax Court Rule 162, Respondent's determination letter rejecting Petitioners' Whistleblower claim transmuted from a final determination into an interim determination once Respondent began its subsequent investigation and examination of Petitioners' Whistleblower Claim.

16. As reflected in Exhibit A, attached hereto and redacted to protect Petitioners' Identities, on or about February 4, 2013, Respondent's Whistleblower Office contact Petitioners and informed them that their case has been re-opened by Respondent's Whistleblower Office. Exhibit A reflects the letter sent by Respondent to Anonymous 2. Anonymous 1 would have received a similar letter.

17. Exhibit A reflects new evidence which was not previously available to Petitioners because it did not exist at the time Petitioners filed their transmuted Motion to Vacate Decision Under Tax Court Rule 162.

18. Additionally, Exhibit A, despite claims by Respondent to the contrary, represents the transmutation of Respondent's Determination Letter dated April 26, 2011 from a final determination to an interim determination, and renders the Court's Order

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dated November 2, 2012 moot because the case is not ripe for summary judgment and because the Court lacks jurisdiction to hear the case.

19. The Court lacks jurisdiction to hear this case because, as stated by the Court in Cooper v. Commissioner, 135 T.C. 4 (2010) (hereinafter referred to as "Cooper I"), the pre-requisite for filing a petition in Tax Court regarding a review of a whistleblower action is a determination that "constitutes a final administrative decision regarding petitioner's whistleblower claims in accordance with the established procedures." See Id., Cooper, 135 T.C. 4. In this case, with Respondent's subsequent re-opening of Petitioners' Whistleblower claim, Respondent's determination dated April 26, 2011 is no longer a final administrative decision. Accordingly, the Court lacks jurisdiction to evaluate whether Respondent's actions were an abuse of discretion and also lacks jurisdiction to grant Respondent's motion for summary judgment filed on September 16, 2011.

20. Petitioners respectfully request that this Court vacate its order dated November 2, 2012.

21. Respondent in its response to Petitioners' Motion to Vacate under Tax Court Rule 162, claims that Petitioners presented no new evidence and did not conduct any further inquiry of information contained in Respondent's Status Report dated August 17, 2012. Respondent's position is in error, because at the time of the filing of Respondent's Status Report, Petitioners' Counsel did in fact make inquiries regarding Respondent's investigation by attempting to ascertain the exact nature of the "new" investigation being conducted by Respondent and whether Petitioners' whistleblower

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claim would be revived. Additionally, Petitioners' Counsel could not have presented the newly discovered facts as reflected in Exhibit A, because Respondent had yet to officially re-open Petitioners' claim.

22. Respondent's objections to Petitioners' Motion to Vacate have been addressed and should not prevent the Court from granting Petitioners' Motion to Vacate the Court's Order Dated November 2, 2012, and performing the following actions: 1) dismissing the case for lack of jurisdiction, and 2) remanding the case back to the IRS for a final determination.

**PREVENTION OF MISJUSTICE**

23. As stated by this Court in Meier v. Commissioner, 91 T.C. 273, 282 (1988) the doctrine of res judicata and/or the related doctrine of collateral estoppel "have the dual purpose of protecting litigants from the burden of relitigating an identical issue and of promoting judicial economy by preventing unnecessary or redundant litigation."

24. Res judicata, or claim preclusion, was developed by the courts to bar repetitious suits on the same cause of action and is applicable to tax litigation. Whereas collateral estoppel applies to issues litigated in the first suit. As stated by the Supreme Court in Allen v. McCurry:

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. \* \*  
\* Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action \* \* \*. Id., Allen v. McCurry, 449 U.S. 90, 94 (1980).

25. In whistleblower cases before, the Court has not defined common terms, with specificity, that provide guidance for practitioners, whistleblowers, and Respondent

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in ascertaining whether a particular action undertaken by the IRS meets the Court mandated prerequisites of determining whether the IRS has abused its discretion with respect to a whistleblower claim. For example, the Court and the IRS, through its regulations, have not clearly defined the terms administrative action and collected proceeds.

26. In this case, because Petitioners' underlying case has been "re-opened" by the IRS, a dispute could arise in the subsequent examination of the non-compliant taxpayer/promoter or its clients which would generate another rejection letter in the future. However, because the Court already ruled on the first claim of abuse of discretion in favor of Respondent by granting Respondent's Motion for Summary Judgment, Respondent could take the position that the actions of Respondent failed to amount to an administrative action and/or collected proceeds; and based on the prior summary judgment motion and granting of summary judgment by the Court, the Petitioners are barred from petitioning the Court for a review of the facts to determine whether an abuse of discretion occurred.

27. Yet, the facts would reflect a genuine material issue of whether Respondent's actions qualified as an administrative action or collected proceeds, as these terms are currently undefined by statute, regulations or the Court. The Court would never get the opportunity to determine whether Respondent abused its discretion because Petitioners would be barred from filing a petition under the doctrine of res judicata or collateral estoppel. Respondent would claim that the issue was previously

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litigated and the Court determined that Respondent was entitled to summary judgment in its favor.

28. To prevent such an injustice or miscarriage of justice, the Court should vacate the granting of Respondent's Motion for Summary Judgment and permit the case to be resolved administratively, while preserving Petitioners' future appeal rights to the Court. By not vacating the prior order by the Court granting Respondent's Motion for Summary Judgment, the Court would be prejudicing Petitioners by limiting its appeal rights in the second examination of the Petitioners' whistleblower claims.

29. Petitioners' Counsel has contacted Respondent's Counsel on Friday, February 22, 2013, and Respondent's Counsel has stated that she objects to the granting of this motion



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**PRAYER FOR RELIEF**

Petitioners respectfully request that the Court **vacate its order dated November 2, 2012, and dismiss the case for lack of jurisdiction.**

RESPECTFULLY SUBMITTED,

PETITIONERS  
ANONYMOUS 1  
ANONYMOUS 2

Date: 2/25/13

By: /s/ Thomas C. Pliske  
THOMAS C. PLISKE  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **PETITIONERS' REPLY TO RESPONDENT'S RESPONSE TO PETITIONERS' MOTION TO VACATE PURSUANT TO TAX COURT RULE 162** was sent to Respondent by electronic filing via the United States Tax Court efilng service on February 25, 2013 as follows:

ASHLEY M. Bender  
Counsel (General Legal Services)  
1111 Constitution Avenue, NW  
Room 6404 CC:GLS  
Washington, DC 20224

Date: 2/25/13

By: /s/ Thomas C. Pliske  
Thomas C. Pliske  
Attorney for Petitioners

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