

US TAX COURT
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US TAX COURT
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WHISTLEBLOWER 21276-13W, ET AL.

Petitioner(s)

PAPER FILED

v.

Docket No. 21276-13W,

21277-13W

COMMISSIONER OF INTERNAL REVENUE,

Respondent

MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION
PURSUANT TO RULE 161

UNITED STATES TAX COURT

WHISTLEBLOWER 21276-13W, ET AL.,)
)
) Petitioners,)
)
) v. Docket Nos. 21276-13W
) 21277-13W
COMMISSIONER OF INTERNAL REVENUE,)
) Filed Under Seal
) Respondent.)

MOTION FOR RECONSIDERATION

RESPONDENT MOVES, pursuant to Tax Court Rule 161, that the Court reconsider its Opinion filed on August 3, 2016, on the grounds that the Court's interpretation of collected proceeds, when applied in conjunction with the Court's prior interpretation of "amount in dispute" in Whistleblower 22716-13W v. Commissioner, 146 T.C. No. 6, (2016), leads to an erroneous reading of I.R.C § 7623(b) that is internally inconsistent and leads to an illogical result. Further, the Court's holding that collected proceeds are to be used only for purposes of calculating the amount of the award to be given to the whistleblower constitutes a substantial error of law and is contrary to Congress' intent that all whistleblower awards be paid from collected proceeds.

IN SUPPORT THEREOF, respondent respectfully states as follows:

1. The parties filed a Second Supplemental Stipulation on December 15, 2015 notifying the Court they had reached a partial settlement agreement. The parties stipulated that the proper award percentage is 24% but could not agree as to the scope of collected proceeds. Respondent's position is that only the \$20,000,000 collected in restitution are collected proceeds for purposes of an award under section 7623. Petitioner's position is that the remaining \$54,131,693.42 collected by various agencies of the federal government from the taxpayer pursuant to a plea agreement, consisting of a criminal fine and civil forfeitures, are also collected proceeds under 7623. The parties requested that the Court rule on what portion, if any, of the \$54,131,693.42 constitute collected proceeds.

2. Petitioner's Brief on Collected Proceeds and Respondent's Memorandum on Collected Proceeds were filed on December 15, 2015. Petitioner filed a Response to Respondent's Memorandum on Collected Proceeds and Respondent filed a Reply Memorandum on January 28, 2016 and February 1, 2016, respectively. Petitioner also filed a Notice of Supplemental Authority dated March 25, 2016, attaching the Court's opinion in Whistleblower 22716-13W v Commissioner, 146 T.C. No. 6.

3. On August 3, 2016, the Court issued its opinion holding that the criminal fine and civil forfeitures are collected proceeds for purposes of an award under section 7623(b). The Court's opinion also specifically held that (1) "the phrase 'collected proceeds' is sweeping in scope and is not limited to amounts assessed and collected under title 26"; and (2) under section 7623(b) "collected proceeds are to be used only for purposes of calculating the amount of the award to be given to the whistleblower."

MOTION FOR RECONSIDERATION STANDARD

4. Tax Court Rule 161 permits a party to file a motion for reconsideration of an opinion or findings of fact if filed within 30 days after a written opinion has been served. Reconsideration under Rule 161 is intended to correct "substantial errors of fact or law" and to allow "the introduction of newly discovered evidence that the moving party could not have introduced, by exercise of due diligence, in the prior proceeding." Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998). Reconsideration is warranted when the moving party demonstrates unusual circumstances or substantial error. Id.; Vaughn v. Commissioner, 87 T.C. 164, 166-167 (1986); but see Estate of Quick v. Commissioner, *supra* at 441-442

("Reconsideration is not the appropriate forum for rehashing previously rejected legal arguments or tendering new legal theories to reach the end result desired by the moving party."). However, a motion for reconsideration "will be granted if the Court did not give prior adequate consideration to the possible ramifications of its opinion." Frank Sawyer Trust of May 1992 v. Commissioner, T.C. Memo 2014-128 at *5 (2014).

5. Respondent is not seeking to rehash legal arguments previously made or raise arguments that could have been made in the prior proceedings. The parties' previous briefings demonstrate that both parties interpret the statute to require that any award paid pursuant to section 7623(b) must be paid from the proceeds of amounts collected. Thus, neither party was afforded the opportunity to brief this issue prior to the Court's opinion. Moreover, the Court's opinion in Whistleblower 22716-13W v. Commissioner, which interprets the term "amounts in dispute" in a manner inconsistent with this opinion, was not issued until after the parties filed their briefs.

THE COURT'S OPINION IS INCONSISTENT WITH WHISTLEBLOWER
22716-13W AND FAILS TO HARMONIZE THE PROVISIONS OF SECTION
7623 (b)

6. In Whistleblower 22716-13W, the Court examined the \$2 million threshold requirement of section 7623(b)(5), which

provides that in order for a whistleblower to qualify for a mandatory award under section 7623(b) "the tax, penalties, interest, additions to tax, and additional amounts in dispute [must] exceed \$2,000,000." The Court agreed with respondent's interpretation of the statute and held that the term "additional amounts" means the civil penalties set forth in Chapter 68 of the Internal Revenue Code. 146 T.C. No. 6 at *6-7. The Court further held that FBAR civil penalties, which are not penalties under Chapter 68, were not includible in the \$2 million threshold requirement of section 7623(b)(5). Id.

7. In the present opinion, the Court examined the language of section 7623(b)(1), which provides that a whistleblower shall receive a mandatory award of 15 to 30 percent of the "collected proceeds (including penalties, interest, additions to tax, and additional amounts)," assuming the requirements of section 7623(b)(5) are met. Here, the Court held that non-title 26 amounts, specifically criminal fines and civil forfeitures, constitute collected proceeds for purposes of these mandatory awards. 146 T.C. No. 6 at *9-11. In its opinion, the Court recognized its prior jurisprudence interpreting section 7623(b)(5), concluding that its holdings Whistleblower 22716-13W did not conflict with the present holding. Id. at *7-8.

8. In determining that there is no conflict in its interpretations of two interdependent provisions of section 7623(b), the Court emphasized the differences in the language used by Congress, specifically the use of the words "collected proceeds" and "including" in section 7623(b)(1). The Court did not, however, address the fact that its current interpretations of section 7623(b) cannot be read in harmony, even in light of these minor plain language differences. Moreover, this disjunctive interpretation of section 7623(b)(1) and (b)(5) renders section 7623(b) internally inconsistent and leads to an illogical result.

9. It is a fundamental principle of statutory interpretation "that a statute [must] be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers the statutory purpose." Greenoak Holdings Ltd. v. Commissioner, 143 T.C. 170 (2014); see also Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809, (1989). "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in

context." Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2005); see also Brown v. Gardner, 513 U.S. 115, 118, (1994) (holding that "[a]mbiguity is a creature not of definitional possibilities but of statutory context"). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2005) (internal citations omitted); see also King v. Burwell, 135 S. Ct. 2480 (2015).

10. Section 406 of the Tax Relief and Health Care Act of 2006 (the 2006 Act), Public Law 109-432 (120 Stat. 2922), enacted on December 20, 2006, redesignated the existing statutory authority to pay IRS whistleblower awards at the discretion of the Secretary as section 7623(a) and added a new provision regarding mandatory awards to certain individuals as section 7623(b). Generally, section 7623(b) provides that qualifying whistleblowers will receive an award of a percentage of the collected proceeds resulting from an action in which the Secretary proceeded based on the information provided by the whistleblower. As a threshold matter, in order to qualify for an award under section 7623(b), an individual must submit information subject to penalties of perjury, the target

taxpayer's gross income must exceed \$200,000 for any taxable year subject to action, and the amounts in dispute in the action must exceed \$2,000,000. Finally, section 7623(b)(4) provides that any determination regarding an award under section 7623(b)(1), (2), or (3) may be appealed to the Tax Court. Notably, the rules at section 7623(b) governing mandatory IRS whistleblower awards were all added via the 2006 Act. There should be no question that Congress clearly intended the new mandatory award rules at section 7623(b) to operate and be applied as a coherent statutory scheme.

11. Under the interpretation of section 7623(b)(5) adopted by the Court, a whistleblower is only entitled to an award under section 7623(b) if "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000." Once this initial statutory hurdle is cleared, however, the Court interprets section 7623(b)(1) to entitle a whistleblower to an award calculated on collected proceeds, which the Court defines as "all proceeds collected by the Government from the taxpayer." Read together, the Court interprets Congress as intending that awards comprise amounts that are not included in the threshold determination of whether an individual is entitled to an award. In other words, in the situation where there are only non-title

26 amounts in dispute, the whistleblower would not meet the section 7623(b)(5) threshold amount and would therefore, not be entitled to any award under section 7623(b).

12. The Court suggests that the language at section 7623(b)(1) reveals Congress' "intent that the mandatory whistleblower program be an expansive awards program." However, the Court's opinion cannot be reconciled with the fact that Congress explicitly limited mandatory awards to those actions involving tax, penalties, interest, additions to tax and additional amounts. Nor does the opinion explain how decoupling the amounts included in determining eligibility for an award from the amounts included in determining the award effectuates congressional intent. Finally, the Court does not consider that under its holdings, an action resulting in hundreds of millions or even billions of dollars being collected that do not constitute tax, penalties, interest, additions to tax and additional amounts will not result in any award under section 7623(b), while an action resulting in the exact same amount of collections, plus a comparatively insignificant \$2 million in tax, will result in an "expansive" award encompassing not only the \$2 million in tax, but also the other amounts collected. This is an anomalous result, which fails to recognize that

Congress included the threshold requirement of section 7623(b)(5) in the 2006 Act for a reason.

13. Respondent has offered a harmonious interpretation that effectuates and reconciles all the provisions of section 7623(b). Respondent acknowledges that the wording of the two provisions of section 7623(b) is different. Section 7623(b)(1) refers to "collected proceeds (including penalties, interest, additions to tax, and additional amounts)," while section 7623(b)(5) refers to "tax, penalties, interest, additions to tax, and additional amounts." Respondent asserts, however, that proceeds collected by a taxing agency can be reasonably interpreted to be "taxes" with the subsequent explanatory parenthetical clarifying that penalties, interest, additions to tax, and additional amounts are also specifically included. Moreover, the use of the term collected proceeds is indicative of nothing more than congressional intent to link the funding source for the payment of awards to the authorizing language already found at section 7623(a)—"proceeds of amounts collected." Notably, respondent's interpretation reads the threshold at section 7623(b)(5), to operate in harmony with the collected proceeds determination under section 7623(b)(1). The same amounts used to determine whether an individual is entitled

to a mandatory award under the statute are also used as the basis for determining the amount of such award.

THE COURT MISCONSTRUES SECTION 7623(b) WITH REGARD TO
TO THE PAYMENT OF WHISTLEBLOWERS

14. In addition to interpreting and applying the subsections of section 7623(b) in isolation, the Court also erroneously divorces the application of section 7623(a) from section 7623(b) by concluding that the whistleblower award program of section 7623(a) is "separate" and "distinct" from the "mandatory whistleblower program of section 7623(b)." While finding that section 7623(a) requires the Secretary to pay the whistleblower an award from the proceeds of amounts collected, the Court found that section 7623(b) does not "refer to, or require the availability of funds to be used in making an award." The Court interpreted the "collected proceeds" language in section 7623(b) to merely require that collected proceeds are to be used only for the purpose of calculating the amount of the award to be given to a whistleblower.

15. The Court's opinion focuses on the language at section 7623(a) - "[a]ny 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"-and the absence of such language in section 7623(b). Rather than reading the provisions of (a) and (b) in tandem, the Court reasons that section 7623(b) is "different" and establishes an entirely separate and distinct award program.

16. Respondent asserts that the fiscal instruction set forth in section 7623(a) requiring awards to be paid from collected proceeds applies equally to the awards paid under section 7623(b). It is true that the words "any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected" are only found in section 7623(a) and not in section 7623(b). However, neither subsection can be read in a vacuum as they are clearly interdependent. In fact, section 7623(b) references back to section 7623(a), a point not addressed in the Court's analysis. Section 7623(b) states "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 receive an award." (emphasis added). Clearly section 7623(b) references and is intended to incorporate section 7623(a).

17. Section 7623(a), in its entirety states:

(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.* (emphasis added).

18. Despite the fact that section 7623(b) clearly incorporates and references section 7623(a), the Court concluded that two key phrases in section 7623(a) do not apply to section 7623(b). The two phrases are "in cases where such expenses are not otherwise provided by law" and "any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amounts so collected shall be available for such payments."

19. However, this interpretation ignores the fact that the "detecting underpayments" and "detecting and bringing to trial" language that describes an administrative or judicial action in subsection (a) is specifically qualified by the language "in cases where such expenses are not otherwise provided for by law," which is part of the same sentence. A case where such expenses are otherwise provided for by law would not constitute

an "action described in subsection (a)" and therefore, would not meet the requirements for an award under section 7623(b). Yet the Court somehow concludes that the language "in cases where such expenses are not otherwise provided for by law" only applies to section 7623(a) awards, even though it is intrinsically linked to the "administrative or judicial action" required for a section 7623(b) award. 147 T.C. No. 4 at *11. Through this interpretation, the Court essentially determined that only certain parts of one sentence in subsection (a) apply to subsection (b), but the end of that sentence "in cases where such expenses are not otherwise provided for by law" does not.

20. The Court's interpretation of section 7623 results in an incongruous construction of the statute that contravenes the principle that a statute be read as a whole. The last sentence in section 7623(a), which requires that awards be paid from the proceeds of amounts collected, is reasonably interpreted as qualifying the administrative or judicial action described in (a), and therefore applicable to awards paid under section 7623(b). Moreover, such interpretation aligns with the plain language of section 7623(b), which provides that in appropriate cases, the whistleblower shall receive an award of the collected proceeds. Finally, as previously discussed, under respondent's

interpretation, which looks at the statute as a harmonious whole, Congress used the language "collected proceeds" in section 7623(b) to link the funding source for section 7623(b) awards to the authorizing language already found at section 7623(a)—"proceeds of amounts collected". The specific language chosen by Congress and the cross-reference between the two sections demonstrate that the two sections should be read as part of an overarching award program where section 7623(a) authorizes payment of awards, and section 7623(b) provides that those payments will be mandatory when certain requirements are met.

21. Congress chose to amend the whistleblower statute and add subsection (b) to it; had Congress intended the provisions of (a) and (b) to operate without reference to each other, it would have enacted a separate statute. By not doing so, it can only be reasonably concluded that Congress intended all the provisions of the statute to be read as an entire act. "Courts presume lawmakers have a definite purpose in every enactment and have adapted and formulated subsidiary provisions in harmony with the purpose." 2A Sutherland Statutory Construction, Section 46:5 (7th ed.); accord Greenoak Holdings Ltd. v. Commissioner,

143 T.C. 170 (2014); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809, (1989).

22. In 1996, Congress added the following language to I.R.C. § 7623: "Any amount payable under the preceding sentence shall be paid from the proceeds of amounts (other than interest) collected by reason of the information provided, and any amount so collected shall be available for payment." See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat. 1452, 1473 (1996). Prior to this amendment, the IRS paid whistleblower awards out of its appropriated funds, if available. When appropriated funds were not available, the IRS and whistleblowers were forced to seek supplemental appropriations in advance of a particular whistleblower award. In response, the 1996 amendment created a specific, permanent appropriation from which whistleblower awards would be drawn. The statutory change strengthened the whistleblower program by providing the IRS with a funding source that did not require whistleblower awards to compete with other IRS program priorities that were all paid from its annual appropriations.

23. There is nothing in the statute or legislative history to suggest that when Congress added subsection (b) in 2006, it intended to decouple the permanent indefinite funding authority

in subsection (a) from (b). Rather, the language in (b)(1) cross-references (a) such that the two can be read as part of an overarching award program where section 7623(a) authorizes payment of awards, and section 7623(b) provides that those payments will be mandatory when certain requirements are met.

24. The Court's reading of the statute to reach the conclusion that the language in subsection (a) that "any amount payable shall be paid from the proceeds of amounts collected...and shall be available for such payment" is not applicable to subsection (b), leads to an outcome that could not have been intended by Congress. In essence, the Court's decision has the peculiar consequence that the discretionary award program under subsection 7623(a) has an assured funding source, (collected proceeds) but the mandatory award program under subsection (b) does not.

25. Further, although the Court did not address how whistleblower awards under section 7623 (b) would be funded, the Court's conclusion that Congress did not incorporate the collected proceeds funding in section 7623(a) into section 7623 (b) creates uncertainty concerning the IRS' authority to pay

awards under section 7623(b) absent express statutory authority to use the tax receipts collected from a taxpayer to pay awards.¹

26. Such a result is at odds with the rationale for enacting section 7623(b) in the first place, which was to create greater certainty of awards in order to incentivize whistleblowers to come forward. As the Court noted, the prior discretionary whistleblower program was largely deemed ineffective. The 2006 revisions to section 7623 were intended to remove much of this uncertainty by mandating awards be paid under certain circumstances, and prescribing minimum and maximum award percentages.² It makes no sense to believe that Congress, at the same time it acted to incentivize whistleblowers to come

¹ The IRS is required to deposit the collected proceeds into the Treasury pursuant to I.R.C. 7809. I.R.C. 7809(a) provides that "the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid into the Treasury as internal revenue collections, without any abatement or deduction on account of salary, compensation, fees costs, charges, expenses, or claims of any deduction."

² See TREASURY INSPECTOR GEN. FOR TAX ADMIN., The Informant's Reward Program Needs More Centralized Management Oversight (2006), available at <http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.html>. This report was prepared in response to Congress' request for review of the IRS whistleblower program.

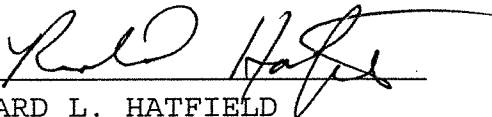
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forward, would also remove the assured source of funding to pay these awards, and dilute the vitality of the mandatory award program.


WHEREFORE, it is prayed this motion be granted.

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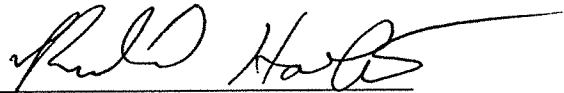
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MOTION FOR RECONSIDERATION was served on counsel for petitioner by mailing the same on September 2, 2016 in a postage paid envelope addressed as follows:

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