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[ORAL ARGUMENT NOT YET SCHEDULED]

# No. 17-1119

## IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHISTLEBLOWER 21276-13W,
Petitioner-Appellee
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

Consolidated with No. 17-1120

On Appeal from the United States Tax Court, T.C. No. 21276-13W

## BRIEF OF APPELLEES

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), counsel certifies as follows:

**A. Parties and Amici.** All parties, intervenors, and amici appearing before the tax court and in this Court are listed in the Brief for Appellant.

**B. Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellant.

**C. Related Cases.** There are no related cases under D.C. Cir. Rule 28(a)(1)(C).

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## GLOSSARY

| | |
|---|---|
| 1996 Act | Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat. 1452 (1996) |
| 2006 Act | Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, § 406, 120 Stat. 2922 |
| Br. | Initial Opening Brief for the Appellant |
| Doc. | Documents comprising the record below, as numbered by the Clerk of the Tax Court |
| DOJ | Department of Justice |
| FBAR | Report of Foreign Bank and Financial Accounts |
| Husband | Petitioner [redacted] |
| IRS | Internal Revenue Service |
| IRS-CI | Internal Revenue Service, Criminal Investigation |
| JA | Deferred joint appendix |
| Petitioners | [redacted] |
| Target | [redacted] |
| Tax Division | Department of Justice, Tax Division |
| USAO-SDNY | U.S. Attorney's Office for the Southern District of New York |
| Wife | Petitioner [redacted] |
| X | [redacted] |

## STATEMENT OF THE ISSUES

Under 26 U.S.C. § 7623(b), the Secretary is required to pay an award based on the "collected proceeds … resulting from" "any administrative or judicial action" for "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same" taken based on a whistleblower's information. There are two issues on appeal:

1. Whether the Tax Court correctly held that a criminal fine and forfeitures collected in a tax conspiracy case are "collected proceeds" for the purpose of calculating a whistleblower award under 26 U.S.C. § 7623(b)(1).

2. Whether the Tax Court correctly held that there were no obstacles to paying the awards in these cases.

## STATUTES AND REGULATIONS

The Pertinent statute, 26 U.S.C. § 7623, is included in the Addendum.

## STATEMENT OF FACTS

### A. Legislative Background

The award provisions at issue have their origins in 1867, when Congress first authorized the Secretary to pay informers—*i.e.*, whistleblowers—for information "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same." Act of Mar. 2, 1867, ch. 169 § 7, 14 Stat. 471, 473. These awards were discretionary, and were understood to apply to criminal tax fraud. *See* Sanborn Contract, 15 Op. Att'y Gen. 133 (1876).

The 1867 award law was eventually codified at 26 U.S.C. § 7623, and remained essentially unchanged until 1996, when it was amended as part of the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat. 1452, 1473 (1996) (the "1996 Act"). The 1996 Act retained the original 1867 language, and added "detecting underpayments of tax" as a separate basis for authorizing awards. *Id.* This amendment was intended to "clarif[y] that rewards may be paid for information relating to civil violations, as well as criminal violations." H.R. Rep. No. 104-506 at 51 (1996). The 1996 Act also added language to section 7623 providing that "[a]ny 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 such payments."

In 2006, Congress significantly amended section 7623. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, § 406, 120 Stat. 2922, 2958 (the "2006 Act"). These amendments were prompted by what Congress saw as shortcomings in the existing discretionary, and its "belie[f] that an enhanced reward program would be more attractive to future informants" S. Rep. No. 109-336 at 31 (2006).

These 2006 Act designated the existing statute as subsection (a), and introduced a second type of award in subsection (b). The new provisions in section 7623(b) provide mandatory awards if specified dollar thresholds and other requirements are met. In particular, the statute requires the Secretary to make an award "of the collected proceeds" from "any … action described in subsection (a)" that is based on the whistleblower's information. 26 U.S.C. § 7623(b)(1). The 2006 Act also eliminated the 1996 Act's limitation on paying awards from interest.

**B. Petitioners' Involvement and Assistance**

Petitioners are Husband and Wife who seek awards under section 7623(b) for information they provided the IRS and other government investigators. (Doc. 50 at 3, JA___; Doc. 60 at 3, JA___.) Petitioners' information was essential to the government's tax conspiracy action against a foreign company ("Target"), from which it collected $74,131,694. (Doc. 50 at 17, JA___; Doc. 60 at 14, JA___.)

Husband first came into contact with government agents when—as a result of an IRS investigation and sting operation with undercover IRS agents—he was indicted on an unrelated count of conspiracy to launder funds from pirated compact discs, in violation of 18 U.S.C. § 1956(h). (Doc. 60 at 5, JA___; Ex. 9-J at 1, JA___; Tr. 31:7-11, 116:8-21, JA___.) Following his arrest in October 2009, Husband immediately began cooperating with the IRS and other government agents. (Doc. 50 at 2, JA___; Doc. 60 at 5, JA___.) After providing information on other topics, Husband informed the government that Target was actively helping U.S. taxpayers evade their Federal tax obligations. (Doc. 50 at 2, JA___; Doc 60 at 5-6, JA___.)

Petitioners suggested to government investigators a plan to indict and prosecute Target by building a case around one of its officers. (Doc. 50 at 3-4, 5-6, JA___.) Husband provided detailed information on Target's operations, and advised investigators that Target's partnership structure made it particularly vulnerable to government action. (Doc. 50 at 5-6, JA___; Doc. 60 at 6, JA___.) Husband also suggested a specific officer for investigators to build their case around: X. (Doc. 50 at 6, JA___.)

Using their personal knowledge and relationship with X, Petitioners assisted the government in developing an undercover operation, whereby X would be enticed to participate in a fictitious money laundering and tax avoidance scheme. (Doc. 60 at 7-8, JA___.) Petitioners then helped the government execute this plan. Husband helped draft all the paperwork for the fictitious transaction, and contacted X to set up a meeting between X and Wife. (Doc. 60 at 8, JA___.)

In February 2010, Wife flew to London where she met X and covertly recorded incriminating conversations. (Doc. 60 at 9-10, JA___.) Subsequently, the government became concerned that X had gotten cold

feet. (Doc. 60 at 10, JA___.) To get the undercover operation back on track, Husband was dispatched to meet with X, alone, in the Cayman Islands. (*Id.*) In June or July 2010, Wife again wore a wire and met X in London, where she introduced him to an undercover agent. (Doc. 60 at 10-11, JA___.) Husband subsequently recorded several incriminating telephone conversations with X, and persuaded him to travel to the U.S., where he was arrested in October 2010. (Doc. 60 at 11-12, JA___.)

X initially agreed to cooperate with the government's investigation of Target, and was allowed to return abroad. (Doc. 60 at 12, JA___.) But instead of cooperating, X broke his word and asked for help from Target's ownership. (*Id.*) At the request of the government, Husband traveled alone to meet X, and ultimately persuaded him to cooperate with the government. (Doc. 60 at 12-13, JA___.)

Husband continued assisting investigators by reviewing and confirming the accuracy of information X provided. (Doc. 60 at 13, JA___.) Additionally, before Target was indicted, Husband met with prosecutors from the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY"), along with IRS agents, to provide them information regarding Target's operations and structure. (*Id.*)

### C. The Government's Action Against Target

The IRS was involved in the government's pursuit of Target from the beginning. (Doc. 60 at 14, JA___.) In June 2010, after Petitioners' undercover operation had begun, USAO-SDNY made a request with the IRS to expand a grand jury to include Target. (Ex. 27-J item 1, JA___; Tr. 48:12-17, JA___.) In accordance with IRS Criminal Investigation (IRS-CI) procedures for a tax-related grand jury matter, *e.g.*, I.R.M. 9.5.2.3.1 and 9.5.2.3.1.5(1) (June 24, 2014), a Criminal Evaluation Memorandum (CEM) was prepared by IRS Criminal Tax (CT) counsel, and Form 9131, Request for Grand Jury Investigation was prepared by a special agent and approved by the IRS's Chief of Criminal Investigation. (Ex. 27-J items 2-4, JA___.)

The DOJ's Tax Division subsequently approved a grand jury investigation of Target in October 2010. (Doc. 50 at 11, JA___; Ex. 27-J item 5, JA___.) After the grand jury expansion, USAO-SDNY began receiving information obtained from Husband and from the undercover operation against X. (Doc. 50 at 11, JA___.)

In February 2012, Target was charged with one count of conspiracy to defraud the IRS and violate 26 U.S.C. §§ 7206(1) and

7201, in violation of 18 U.S.C. § 371. Superseding Indictment, [redacted]. The same day, the United States filed a complaint *in rem* seeking the seizure of one of Target's bank accounts. Verified Complaint, [redacted]. The complaint was verified by an IRS-CI special agent, and stated that IRS-CI conducted an investigation of Target's tax conspiracy. (*Id.* at 2, 54.)

By January 2013, Target and the government reached a plea agreement, under which Target agreed to pay the United States a total of $74,131,694. (Doc. 74 Ex. 1-J,[1] JA___.) This amount consisted of: (1) $20,000,001 in restitution to the United States under 18 U.S.C. § 3556; (2) a $22,050,000 million criminal fine imposed under 18 U.S.C. § 3571; (3) a forfeiture of $15,821,000 under 18 U.S.C. § 981; and (4) relinquishment of its claim to $16,260,693 previously forfeited. (*Id.*) In exchange, the Tax Division agreed not to further prosecute Target for any other tax offenses relating to its tax conspiracy. (*Id.* at 2, JA___.)

[1] Target's plea agreement is attached as Exhibit 1-J to the parties' Second Supplemental Stipulation of Facts (Doc. 74). But it does not appear that the document "was previously admitted."

The government collected the $74,131,694 as contemplated by the plea agreement. (Doc. 74 at 3-4, JA___.)

**D. Petitioners' Award Claims and Initial Proceedings Below**

In the course of providing assistance to the government, Husband became aware of the whistleblower award program after a government agent mentioned it. (Doc. 60 at 15, JA___.) In April 2013, after Target had paid over $74 million to the government, Petitioners each submitted award claims to the IRS Whistleblower Office. (*Id.*) The IRS rejected Petitioners' award claims, and they timely filed separate petitions in the Tax Court pursuant to 26 U.S.C. § 7623(b)(4). The court consolidated Petitioners' cases. (Doc. 16, JA___.)

The IRS's final determination letters stated Petitioners' claims were denied because their information did not result in the collection of any proceeds, but the IRS asserted on appeal that it had denied Petitioners' claims as untimely. (Doc. 18, JA___.) The court determined that the IRS's administrative file was inadequate, and, in November 2014, held a two-day bench trial in order to determine what information Petitioners provided to the IRS, and whether it met the requirements of 26 U.S.C. § 7623(b). (Doc. 60 at 4, JA___.) In a June 2, 2015 opinion, the

Tax Court made numerous factual findings, and held that Petitioners' award claims were timely. (Doc. 60, JA___.) The court retained jurisdiction and ordered the parties to attempt to resolve their dispute. (Doc. 62, JA___.)

**E. Further Proceedings Below Regarding "Collected Proceeds"**

The parties then reached a partial settlement. (Doc. 74 at 4, JA___.) They agreed that Petitioners were entitled to a whistleblower award under section 7623(b), and that the amount of the award would be 24% of the "collected proceeds" from the action against Target. (*Id.*) Though the parties agreed the government had collected $74,131,694 from the action, the parties could not reach agreement on the amount of collected proceeds. Whereas Petitioners sought an award from the entire amount, the IRS agreed only that the $20,000,001 in restitution paid by Target was "collected proceeds" under section 7623(b) (*Id.*) The parties agreed to submit their dispute to the court. (*Id.*)

The government contended that the plain language of section 7623 limited "collected proceeds" solely to those amounts assessed and collected directly under a provision in title 26. (Doc. 78 at 9, JA___.) The government additionally argued that, even if the funds at issue were

"collected proceeds" under section 7623(b), they would not be "available" for payment because other statutes—*i.e.*, 42 U.S.C. § 10601[2] and 31 U.S.C. § 9705—would prevent the government from paying an award. (Doc. 78 at 9-10, JA___.)

Petitioners, on the other hand, contended that the plain language of the statute encompassed all the amounts at issue, because the entire amount resulted from the same action against Target, which was an action for the punishment of Target's violations of the internal revenue law, or for conniving at the same. (Doc. 78 at 10, JA___.)

In a, August 3, 2016 supplemental opinion, the Tax Court ruled for Petitioners, holding that "collected proceeds" are not limited to amounts collected under title 26, and that the entire $74 million collected from Target was "collected proceeds" under section 7623(b). (Doc. 78, JA___.) The court found that section 7623(b)(1)'s language was "plain" and "written in expansive terms." (Doc. 78 at 10, 11, JA___.) It noted that "collected proceeds" "is not statutorily defined," and therefore

[2] Notably, though much of the government's argument turns on the significance of which title in the U.S. Code a law is codified, 42 U.S.C. § 10601 was moved from title 42 to title 34 after the government's opening brief was submitted. It is now found at 34 U.S.C. § 20101. For ease of reference, we continue to cite its prior location herein.

proceeded to analyze the ordinary meaning of the words "in their context, with a view to their place in the overall statutory scheme." (Doc. 78 at 11-12, JA___.) Turning to the Supreme Court's holding in *Phelps v. Harris*, 101 U.S. 370, 380 (1879), that the term "proceeds" is "a word of great generality," as well as to dictionary definitions, the court held that "collected proceeds" ordinarily means "the total amount brought in." (Doc. 78 at 12, 29, JA___.)

Having noted the Supreme Court's admonition, in *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939), that courts must be wary of overly relying on a statute's context "lest what professes to be mere rendering becomes creation," the court stated it was "leery of arbitrarily limiting the meaning of an expansive and general term such as 'collected proceeds.'" (Doc. 78 at 12, 14, JA___.) It reasoned that Congress could have limited whistleblower awards to amounts collected under title 26, but instead deliberately used the "sweeping term 'collected proceeds.'" (Doc. 78 at 14, JA___.)

The court then examined the statutory context and found that it "reinforces our conclusion." (*Id.*) In particular, the court determined that, in repeatedly using the word "any" to broaden the reach of section

7623(b)(1), "Congress revealed its intent that [section 7623(b)] be an expansive rewards program." (*Id.*)

Next, the court addressed the government's argument that section 7623(a)'s use of the terms "underpayment of tax" and "violating the internal revenue laws" limited awards to title 26 amounts only. (Doc 78 at 14-16, JA___.) First, the court "disagree[d] that internal revenue laws are limited to laws codified in title 26." (Doc. 78 at 15-16, JA___.) The court noted that "none of the provisions cited by [the government] state, or even imply, that internal revenue laws are limited to those laws codified in title 26," and that "[t]here are numerous instances where internal revenue laws are found outside title 26." (Doc. 78 at 16, JA___.)

The court also found 26 U.S.C. § 6531's reference to 18 U.S.C. § 371 to be "especially illuminating," because Target "pleaded guilty to conspiracy … in violation of 18 U.S.C. § 371." (Doc. 78 at 17, JA___.) And because the phrase "internal revenue laws" predated the codification of U.S. laws, the court determined it "erroneous to impose a post facto restriction" on its meaning. (Doc. 78 at 18, JA___.)

The court then turned to the government's contention that a parenthetical in section 7623(b)(1) referring to collected proceeds as

"including penalties, interest, additions to tax, and additional amounts" limited collected proceeds to title 26 only. (Doc. 78 at 18-19, JA___.) The court found that the government "ignores the fact that the first word in the parenthetical … is 'including.'" (Doc. 78 at 19, JA___.) Based on ordinary English usage, as well as 26 U.S.C. § 7701(c)'s definition of "including," the court held that "Congress clearly intended the list … to be nonexhaustive." (Doc 78 at 20.) Additionally, the court noted that the word "penalties" was used interchangeably with the term "fines" in several title 26 provisions, and that because the parenthetical did not include the term "tax," the government necessarily conceded that "collected proceeds" encompassed more than the items listed in the parenthetical. (Doc. 78 at 20-21, JA___.) Finally, the court distinguished its holding in *Whistleblower 22716-13W v. Commissioner*, 146 T.C. 84 (2016). (Doc. 78 at 21-23, JA___.)

The court also drew support from the legislative history. (Doc. 78 at 27-28, JA___.) In particular, it found that "[t]he phrase 'punishment … of persons guilty of violating the internal revenue laws or conniving at the same' has throughout the existence of the statute meant punishment of criminal tax violations." (Doc. 78 at 26, JA___.) And the

court reasoned that "[t]he implication of the [1996] amendment is that before 1996, the IRS denied whistleblower awards for reporting civil tax deficiencies on the basis that the statute authorized awards only for the reporting of criminal tax violations." (Doc. 78 at 28 n.18, JA___.) In the court's view, this history "is at loggerheads with [the government's] fundamental position in these cases that criminal fines do not constitute collected proceeds because they are not assessed and collected under title 26." (Doc. 78 at 27-28, JA___.)

The court then addressed the specific amounts at issue. It found that "[i]n these cases the Secretary, through the IRS' criminal enforcement unit, took administrative action" within the meaning of section 7623(b)(1) (Doc. 78 at 27, JA___.) The court further found "[t]hat action ultimately resulted in [Target]'s entering into a plea agreement and, inter alia, agreeing to pay a criminal fine." (*Id.*) The court reasoned that "[w]ithin the context of section 7623(b)(1) … a forfeiture is similar to a criminal fine." (Doc. 78 at 30, JA___.) Thus, the court held that both "the criminal fine … and the civil forfeitures … are collected proceeds for purposes of an award under section 7623(b)." (Doc. 78 at 32-33, JA___.) The court also held that the flush language of subsection (a),

relating to "expenses … not otherwise provided for by law," did not bar an award, because it applied only to discretionary awards under section 7623(a). (Doc. 78 at 31.)

The court then held that section 7623(a) and section 7623(b) "provide awards to whistleblowers via two subtly different mechanisms." (Doc. 78 at 24, JA___.) It determined that, while "[s]ection 7623(a) explicitly provides that the whistleblower award is to be paid from the proceeds collected," "subsection (b)(1) provides that the whistleblower award is calculated by using a percentage of the collected proceeds." (Doc. 78 at 25, JA___.) Thus, the court held that "the collected proceeds are to be used only for purposes of calculating the amounts of the award," which need not be paid directly from them. (Doc. 78 at 26, JA___.)

Accordingly, the court did not reach the issue of whether 42 U.S.C. § 10601 and 31 U.S.C. § 9705 meant that the criminal fine and forfeitures were not "available" for an award. The court noted, however, that section 7623(a) "explicitly makes all such proceeds available for use in making the award," and that the government "desires the Court to

impose some, but not all of … section 7623(a) on … section 7623(b)." (Doc. 78 at 29, JA___.)

The court subsequently denied the government's motion for reconsideration, (Doc. 92, JA___.) It then entered decisions implementing its rulings and the parties' partial settlement. (Doc. 104, JA___.)

## SUMMARY OF ARGUMENT

This case involves the straightforward application of statutory language to the uncontested facts. Petitioners seek whistleblower awards for information that led to the investigation and prosecution of Target for serious tax crimes. Target was charged with, and pleaded guilty to, conspiring to defraud the IRS and violate 26 U.S.C. §§ 7206(1) and 7201. As a result, Target paid the government over $74 million in fines, forfeitures, and restitution.

Although the government concedes that Petitioners are entitled to section 7623(b) award from the action against Target, it contends that the fines and forfeitures are not "collected proceeds" under section 7623(b)(1). As the court held below, the plain language of the statute, its history and purpose, and the record below compel the conclusion

that the entire amount collected from Target's tax conspiracy sentence is "collected proceeds" for the purpose of determining Petitioners' award. The decisions below should be affirmed.

1. Under the government's interpretation, only amounts assessed and collected as a "tax" under a provision of title 26 are "collected proceeds" under section 7623(b). According to the government, fines and forfeitures collected as a result of a criminal tax violation—whether under title 18 or title 26—do not count towards an award. The government's interpretation thus effectively limits awards under section 7623 to amounts the IRS could collect using its civil enforcement machinery.

The government's narrow interpretation is foreclosed by the plain language of section 7623, which unambiguously requires awards to be based on the based on the entire amount collected from the government's actions. And it is also foreclosed by Congress's clearly-expressed intent that section 7623 apply to criminal violations, and not just to civil violations.

Section 7623(b)(1) is triggered if the Secretary of Treasury proceeds with "any administrative or judicial action" for "detecting and

bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same" based on a whistleblowers' information. In such a case, the whistleblower is entitled to an award of the "collected proceeds … resulting from the action (including any related actions) or from any settlement in response to such action." 26 U.S.C. § 7623(b)(1).

The statute's language is clear: "collected proceeds" is any amount resulting from the government's action. And, as the tax court correctly found, the IRS's criminal investigation of Target was an "action" encompassed by section 7623, which resulted in over $74 million in proceeds to the government. (Doc. 78 at 27, JA___.) Applying the statute's plain command that whistleblowers "shall … receive as an award [15-30%] of the collected proceeds … *resulting from the action* … or any settlement in response to such action," the tax court correctly held that the entire amount collected by reason of Petitioners' information was "collected proceeds" for the purpose of calculating an award under section 7623(b)(1).

On appeal, the government does little to contend with the plain, ordinary meaning of "collected proceeds," or the commonsense

proposition that a criminal tax conspiracy case is an action aimed at "punish[ing] persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a)(2). Instead, the government tries to change the subject. Resorting to the "statutory context" and to "construing the statute as a whole," the government would have this Court impose a bright-line rule found nowhere in the statute's text, and ignore the reality of criminal tax enforcement, which is that title 18 provisions are routinely used to punish criminal violations of the internal revenue laws.

The government's interpretation does not address—and would render superfluous—key statutory language, such as the terms "conniving"—*i.e.*, conspiring—"any related action," and "any settlement." These terms squarely encompass the proceeds collected "via a guilty plea settlement" to a tax conspiracy. (Doc. 74 at 1, JA___.) The government also seeks to substitute language that Congress could have used—but pointedly did not. In spite of the government's bald assertions to the contrary, Congress's deliberate use of the distinct terms "tax" and "collected proceeds," in subsections (b)(1) and (b)(5)

shows that it did not intend to limit "collected proceeds" to "tax"—or to amounts assessed as tax under title 26.

Moreover, 26 U.S.C. § 6531—the statute of limitations for "the various offenses arising under the internal revenue laws"—explicitly applies to tax conspiracy prosecutions under 18 U.S.C. § 371. And, as should be obvious, title 26 does not preempt prosecutions for violating internal revenue laws under title 18. *See United States v. Shermetaro*, 625 F.2d 104, 111 (6th Cir. 1980).

The government's position is at odds with the reality of how criminal tax cases are pursued. Simply put, violations of the internal revenue laws are routinely pursued using title 18 provisions, as Target was in these cases. IRS and DOJ policies demonstrate that title 26 and title 18 work together as a unified system for punishing criminal tax fraud.

Because the government's interpretation all but eliminates the statute's application to criminal violations, it is at odds with the intent and history behind section 7623. From the beginning, the award statute has applied to serious tax crimes. Indeed, both it and the conspiracy statute used to charge Target originated from the same Revenue Act

passed in 1867. When Congress carried forward the original language through amendments in 1996 and 2006, it not only reaffirmed its application to tax crimes, but also strengthened and broadened the award program.

The government's interpretation also departs from its past practice of making awards from non-title 26 amounts. As it conceded below, it made awards from title 18 criminal fines until at least 1996. (Doc. 76 ¶ 12, JA___). And there is unrebutted evidence this practice continued well after 1996. (Doc. 75 Ex. A (Aff. of Robert Gardner), JA___); *see also Whistleblower 22716-13W*, 146 T.C. at 96-97 ("the record … indicates that the [IRS], prior to 2009, did pay discretionary awards … based on [title 31] FBAR recoveries.") Now, though the operative language of the statute has remained unchanged, the government insists its meaning has.

2. The Tax Court correctly held that the award-funding language in section 7623(a) did not apply to awards under section 7623(b), because the phrase "[a]ny amount payable under the preceding sentence" plainly refers only to the discretionary awards made under that sentence. By contrast, section 7623(b)(1) refers only to the "actions

described in subsection (a)," and there is nothing in the statutory text itself that would require the application of subsection (a)'s funding language to subsection (b). Section 7623(b) simply mandates the payment of an award, and specifies how the award is to be calculated. Even assuming the government is correct, it concedes that the IRS is able pay the entire judgments below from the restitution collected from Target, and it is free to decide how the bookkeeping should be done.

Besides, the same result would be reached even under the government's theory that subsection (a)'s funding language applies to subsection (b). The government focuses exclusively on the language in subsection (a) requiring that awards "shall be paid from the proceeds of amounts collected." But if that provision applies to subsection (b), so must the provision immediately following, providing that "any amount so collected shall be available for such payments." 26 U.S.C. § 7623(a). This provision plainly eliminates any obstacles to paying an award from the collected proceeds—including 42 U.S.C. § 10601 and 31 U.S.C. § 9705, which the government claims require the proceeds be deposited into the Crime Victims Fund and the Treasury Forfeiture Fund.

The legislative history of the relevant statutes confirms that they can be reconciled by allowing awards from fines and forfeitures. Congress first established the Crime Victims Fund and the Treasury Forfeiture Funds in 1984 and 1992, respectively. Section 7623 awards were funded from appropriations until 1996, however, and therefore did not interact with the Funds. When Congress turned its attention to the issue in 1996, it specifically made collected proceeds "available" for awards. And when it amended section 7623 in 2006, Congress believed that awards could be made from fines. *See* S. Rep. 109-336 at 30 (2006). If that were not enough, the IRS continued to make section 7623 awards from criminal fines until sometime after the 2006 amendments.

Even in the absence of subsection (a), the statutes can readily be reconciled. 42 U.S.C. § 10601 and 31 U.S.C. § 9705 establish general rules governing the use of fines and forfeitures. By contrast, section 7623 applies only to fines and forfeitures collected in an action based on a whistleblower's information. Section 7623 should therefore be read as an exception to the other provisions. Doing so would most fully give effect to the purpose of each, especially considering that Congress believed that enhanced awards would attract future informants—

ultimately leading more fines and forfeitures to be collected and deposited in the Funds.

## STANDARD OF REVIEW

This Court reviews "the Tax Court's legal conclusions de novo and its factual findings for clear error" *Barnes v. Commissioner*, 712 F.3d 581, 582 (D.C. Cir. 2013). As the government concedes, its later-enacted regulations are not at issue in this case. (Br. 38 n.7.) Its views can therefore be given "no more than the weight derived from their power to persuade." *Barnes*, 712 F.3d at 583 (internal quotations omitted).

## ARGUMENT

### I. All amounts collected by the government from a tax conspiracy prosecution were "collected proceeds" for the purpose of making a whistleblower award under 26 U.S.C. § 7623(b).

Respondent insists that only amounts assessed as taxes under a title 26 provision can be "collected proceeds" under section 7623(b)(1). As this brief shows, however, the weight of authority—starting with the language of section 7623 itself—compels the conclusion that the term is not limited to amounts assessed as taxes under title 26, but includes all amounts collected from a criminal tax case, such as fines and forfeitures.

### A. Under the plain language of the statute, the $74 million collected from Target is "collected proceeds."

The starting point for statutory construction is the language of the statute itself: "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive" *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In these cases, the ordinary meaning of the statute is clear: all the amounts collected from the government's tax conspiracy action against Target were "proceeds … resulting from the action," and are therefore "collected proceeds" under section 7623(b).

Section 7623(b)(1) is triggered when the Secretary "proceeds with any administrative or judicial action described in subsection (a)" that also meets the separate threshold requirements of section 7623(b)(5). Section 7623(a) therefore establishes the scope of actions that are eligible for awards under section 7623(b). Those actions, in turn, are those for "detecting underpayments of tax," or for "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. 7623(a)(1)-(2). If the Secretary "proceeds" with such an action using information provided by a whistleblower, the whistleblower "shall … receive as an award [15-

30%] of the collected proceeds … resulting from the action (including any related actions) or from any settlement in response to such action." 26 U.S.C. § 7623(b)(1). Section 7623(a) also uses the terms "proceeds" and "collected": it specifies that awards "shall be paid from the proceeds of amounts collected by reason of the information provided."

The term "collected proceeds" is not defined by the statute, nor is it a term of art. The separate terms "collected" and "proceeds," which appear in section 7623(a) are likewise undefined. In the absence of a statutory definition, courts "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (relying on dictionary definition). And this Circuit has specifically rejected the argument that a statute is ambiguous when it fails to define a broad term. *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006).

As the Tax Court correctly found, the ordinary meaning of "collected proceeds" is expansive, encompassing everything that is obtained from or results from something. (Doc. 78 at 12, JA___.) As the court noted, (*Id.*), *Webster's Third New International Dictionary* 1807 (1974), defines "proceeds" as "the total amount brought in." "And the

Oxford English Dictionary defines "proceeds" as "[t]hat which proceeds, is derived, or results from something …." (*Id.* (citing 12 *Oxford English Dictionary* 544 (2d ed. 1989)). In this context, "collected proceeds" means all amounts obtained or resulting from any action implicated by section 7623.

When the ordinary meaning of those terms is taken into account, the entire amount collected from Target is plainly "collected proceeds" under section 7623(b)(1). The government does not directly challenge the tax court's finding that "[i]n these cases the Secretary, through the IRS' criminal enforcement unit, took administrative action in response to information provided by petitioners"—*i.e.*, a criminal investigation of Target. (Doc. 78 at 27, JA___.) The tax court further found that this "action ultimately resulted in [Target] entering into a plea agreement." (*Id.*) Thus, the Secretary "proceed[ed] with" an "action described in subsection (a)." 26 U.S.C. § 7623(b)(1). Indeed, the government conceded as much when it determined that Petitioners were entitled to an award of 24% of the collected proceeds. (Doc. 78 at 4, JA___.) The government conceded below that "there was one criminal action against [Target] resulting in a guilty plea agreement and the collection of approximately

$74 million by the government." (Doc. 76 ¶ 11, JA___.) Plainly, then, this entire amount is "proceeds … resulting from the action." 26 U.S.C. § 7623(b)(1).

That the government's action against Target is an "action described in subsection (a)" is also compelled by the statute's plain language. Target was charged with conspiring to defraud the IRS and violate 26 U.S.C. §§ 7206(1) and 7201. (Doc. 78 at 4, JA___.) These violations are not just theoretical—Target completed its conspiracy, as it admitted. (Doc. 74 Ex. 1-J at 9-10, JA___.) The action against Target was quite literally one for "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a)(2). Shorn of its purpose to violate "internal revenue laws," no aspect of Target's conduct was criminal.

Even if, as the government mistakenly argues, "violating the internal revenue laws" refers only to violations of title 26, section 7623(a) also encompasses actions aimed at "conniving at the same." The ordinary meaning of "connive" is "[l]oosely, to conspire," which plainly encompasses the tax conspiracy at issue here. *Black's Law Dictionary*

(10th ed. 2014).[3] And "collected proceeds" includes not only amounts resulting from the "action described in subsection (a)," but from "any related actions" and "any settlement in response to such action." 26 U.S.C. § 7623(b)(1). If the fines and forfeitures collected from Target did not result from an "action described in subsection (a)," *id.*, then they at least resulted from a related action, or from "a guilty plea settlement" in response to such action. (Doc. 74 at 1, JA___.)

Additionally, as the Tax Court noted, (Doc. 78 at 14, JA___), the Congress's repeated use of the term "any" broadens the scope of "collected proceeds." *See United States v. Gonzalez*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning"). These terms make clear that Congress intended awards to be calculated based on the sum total of all aspects of the government's action. By contrast, the government's reading of the statute renders them superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (such a reading is "at odds with one of the most basic interpretative canons").

All that remains to be done is to apply the ordinary meaning of "collected proceeds" to the amounts "resulting from the action." Because

[3] Title 26 does not include a conspiracy provision. *See* I.R.M. 9.1.3.4.8(2) (May 15, 2008).

"[t]he action … resulted … in the collection of $74,136,694.42," (Doc 74 ¶ 1, JA___), the tax court correctly determined that the "collected proceeds" is $74,136,694.42.

### B. "Collected proceeds" includes fines and forfeitures, and is not limited to amounts assessed as taxes under title 26.

As the preceding section makes clear, the plain language of the statute, as applied to the record below, forecloses the government's interpretation of "collected proceeds." In an attempt to overcome this plain language, the government tries to change the subject away from the statute's text and the substance of the underlying action, and towards "the context and the overall statutory goal." (Br. 25.) The government's main contention is that the statute is limited to "violations of the internal revenue laws," which it equates with "tax laws," and which it then baldly asserts means awards are limited to amounts collected as taxes *directly* under title 26.[4] (*E.g.*, Br. 29.) But as shown below, there is nothing section 7623 that precludes its application to the fines and forfeitures resulting from a criminal tax conspiracy.

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[4] We address the government's contention that title 26 criminal fines do not constitute "collected proceeds" in Part II, *infra*.

### 1. Section 7623(a) does not limit "collected proceeds" or the "award base" to title 26 recoveries.

The government contends section 7623(a) and section 7623(b) are *in pari materia*, and that because section 7623(a) refers to "underpayments of tax" and "violating the internal revenue laws," that Congress intended to limit "collected proceeds" to "recoveries … stemming from violations of the federal tax laws contained in title 26." (Br. 29.) Setting aside the fact that the recoveries in these cases do "stem" from such violations, the government badly misreads section 7623(a). To reach its desired conclusion, it focuses only on those portions of the statute it likes, and disregards key terms. In particular, Congress's use of the terms "detecting," "punishing," and "conniving," as well as the disjunctive "or," all serve to expand the scope of actions covered by section 7623 beyond those merely for collecting taxes themselves.

As explained in the preceding section, the ordinary meaning of "conniving" at violating the internal revenue laws embraces tax conspiracies—precisely what Target was charged with and pleaded guilty to. The ordinary meaning of "detect" is "to discover the true character of," or "to discover or determine the existence, presence, or

fact of." *Merriam-Webster's Collegiate Dictionary* 314 (10th ed. 2002). The tax court therefore correctly found that the IRS's criminal investigation of Target was an "action described by subsection (a)." (Doc. 78 at 27, JA___.) The government cannot seriously contest that in acting against Target it sought to—and in fact did—detect "underpayments of tax" or "violat[ions of] the internal revenue laws" or "conniving at the same." Additionally, as the Tax Court correctly noted, the term "punishment" "has throughout the existence of the statute meant punishment of criminal tax violations." (Doc 78 at 26, JA___.) Simply requiring the payment of a tax that is normally due does not satisfy the core sense of the term "punishment," which ordinarily means a sanction that would not be imposed but for a violation of the law. In other words, it embraces fines and forfeitures.

Congress's use of the disjunctive "or" in section 7623(a) confirms that "detecting underpayments of tax" proscribes a distinct category of actions than "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." *See Loving v. IRS*, 742 F.3d 1013, 1018-1019 (D.C. Cir. 2014). But by recognizing only tax restitution as "collected proceeds," and not other

amounts collected from a criminal tax matter, such as fines and forfeitures, the government's theory impermissibly subsumes subsection (a)(2) into (a)(1). *See Corley*, 556 U.S. at 314.

Having ignored significant parts of section 7623(a), the government goes on to argue that, because "internal revenue laws" generally refers to title 26, the "award base" —a term that appears nowhere in the statute—is limited to taxes. (Br. 33-42.) This argument stems from a fundamental misreading of section 7623. As we have explained, section 7623(b) speaks of *actions* —and of the proceeds resulting from those actions. What is at issue here is not whether 18 U.S.C. § 371—or any other title 18 provision—is intrinsically an "internal revenue law." Rather, it is whether the government's *action*, whatever form it takes, relates to enforcing the internal revenue laws. The government's position is effectively that enforcement of the internal revenue laws is limited to recovering taxes—and other amounts that can be assessed as taxes—under title 26.

In *United States v. Shermetaro*, a similar argument was made by a defendant challenging a tax conspiracy conviction under 18 U.S.C. § 371 on the grounds that Congress intended title 26 to be the exclusive

mechanism for addressing internal revenue law violations. 625 F.2d 104, 109 (6th Cir. 1980). The Sixth Circuit rejected the argument, holding "there is no merit in the contention … that Congress has preempted the field of federal income tax law in Title 26 so as to prevent prosecutions for conspiracy to violate those laws pursuant to 18 U.S.C. [§] 371." *Id.* at 111. Similarly, given that title 26 is not the exclusive mechanism for addressing tax law violations, there is no merit to the government's contention that Congress limited the scope of whistleblower awards to title 26. Congress recognized that the government may pursue violations of the tax laws through applicable title 18 provisions—and when it does so based on a whistleblower's information, an award may issue from the resulting proceeds.

Indeed, the Internal Revenue Code, through its statute of limitations, designates tax conspiracies charged under 18 U.S.C. § 371 as "offenses arising under the internal revenue laws." 26 U.S.C. § 6531. In these cases, Target was charged under both the "offense" and "defraud" prongs of 18 U.S.C. § 371. *See* Department of Justice, Tax Div., *Criminal Tax Manual* § 23.02 (2012 ed.) [hereinafter "C.T.M."] ("Section 371 sets out two types of conspiracies: (1) conspiracies to

commit a specific offense against the United States and (2) conspiracies to defraud the United States.") (available at https://www.justice.gov/tax/page/file/950752/download). As the tax court noted, (Doc. 78 at 17, JA___), section 6531(8) explicitly refers to tax conspiracies under the "offense" prong of 18 U.S.C. § 371. While the tax court and the government focus only on section 6531(8), section 6531(1)—which tracks the language of 18 U.S.C. § 371—was specifically intended to apply to tax conspiracies under the "defraud" prong of 18 U.S.C. § 371, and has been so interpreted. *See Braverman v. United States*, 317 U.S. 49, 54-55 (1942). Despite the government's claim that section 6531 "undermines" the decision below, other circuits have also concluded that tax conspiracies charged under 18 U.S.C. § 371 "arise under the internal revenue laws." *See United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 98 (2d Cir. 1983) (Rejecting "the argument … that [conspiracy to defraud the IRS] is not an offense 'arising under' the Internal Revenue laws"); *United States v. Waldman*, 941 F.2d 1544, 1548-49 (11th Cir. 1991).

The government's treatment of the restitution amount in these cases demonstrates the flaws in its theory. Even though the restitution

was ordered pursuant to 18 U.S.C. § 3556, as part of Target's sentencing for violation of 18 U.S.C. § 371, the government contends that it is fundamentally different because a title 26 provision—section 6201(a)(4)—enables the IRS to collect criminal restitution "as a tax." (Br. 24-25.) But as section 6201(a)(4) itself makes clear, restitution is not the same as tax. *See Klein v. Commissioner*, 149 T.C. ___, 2017 WL 4422361 (Oct. 3, 2017) (distinguishing restitution and holding that it is not collected "as a tax"). Indeed, Congress adopted section 6201(a)(4) for the limited purpose of improving the IRS's bookkeeping. *Id.* at *10. Moreover, section 6201(a)(4) was not enacted until 2010. Firearms Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, § 3(a), 124 Stat. 2497. The government's theory requires this Court to accept the proposition that whistleblower awards were largely unavailable for criminal tax matters until it enacted an unrelated law in 2010—an illogical result that directly contravenes section 7623's purpose: encouraging individuals to provide the government information about serious tax fraud.

The restitution amount is also inextricably linked to Target's title 18 tax conspiracy charge. As the IRS's own guidance makes clear,

restitution is not authorized "with respect to Title 26 tax crimes," and, unless otherwise agreed to, can be ordered only "in investigations where the convictions include a covered offense, such as conspiracy …." I.R.M. 9.6.4.20 (May 4, 2012). Additionally, restitution can only be ordered for the offense of conviction—in this case 18 U.S.C. § 371. *See United States v. Udo*, 795 F.3d 24, 33 (D.C. Cir. 2015). Therefore, because it was the tax conspiracy that caused a tax loss to the government, it is a violation of "the internal revenue laws" even if it was not pursued under title 26 provisions.

**2. Section 7623(b) does not limit "collected proceeds" to title 26 recoveries.**

Next, the government contends that the parenthetical list in 7623(b)(1) also compels the conclusion that "collected proceeds" are limited to amounts recovered as taxes under title 26. (Br. 31-33.) But, as the Tax Court correctly held, Congress's use of the term "including" indicates that the parenthetical is nonexclusive, and forecloses the government's argument. (Doc. 78 at 19, JA___.)

The government's attempt to limit "collected proceeds" by way of subsection (b)(1)'s parenthetical is barred not only by ordinary English grammar, but also by 26 U.S.C. § 7701(c), which provides that

"'including' when used in a definition contained in this title… shall not be deemed to exclude other things otherwise within the meaning of the term defined." The other parenthetical in (b)(1)—"including any related actions"—further shows that Congress did not intend these parentheticals to limit any statutory term.

Moreover, the term "penalties" is not "a term of art under Title 26." (Br. 31.) The government's reliance on 26 U.S.C. § 6665 is misplaced. Section 6665 refers only to "the penalties provided by this chapter," namely Chapter 68 of the Internal Revenue Code. 26 U.S.C. § 6665(a)(2). But the term of art for these penalties is "assessable penalties," and they represent only a subset of the penalties imposed by the Code. *E.g.*, I.R.M. 8.11.1.1(2) (Nov. 12, 2013).

The term "penalties" is used in section 7623 in its ordinary, more general sense—as it is elsewhere the Code—and is not limited to amounts assessed as tax. As the tax court correctly noted, "[i]n several places the Code interposes the word 'fine' with the word 'penalties.'" (Doc. 78 at 20 (citing 26 U.S.C. §§ 162(f), 7201), JA___.) The government's explanation that "'tax' [is] the only item missing from the list," (Br. 32), fails to take into account the fact that section 7623

applies to criminal tax cases. *See* 26 U.S.C. § 7623(a)(2) ("punishing"); H.R. Rep. 104-506 at 51 (1996) ("criminal violations"); S. Rep. 109-336 at 30 (2006) ("fines"). But by limiting "collected proceeds" to tax and amounts assessed as tax, the government's interpretation impermissibly limits section 7623 to civil violations.

Additionally, the government argues that because Congress used the term "tax" in section 7623(b)(5), the decision below cannot be reconciled with the "statutory structure." (Br. 43-45.) But Congress used both "collected proceeds" and "tax" in subsection (b), thereby heightening the significance of its choice of "collected proceeds" in subsection (b)(1). It is axiomatic that, where Congress employs different terms in different sections of the same Act, it is "presumed that Congress acts intentionally and purposely." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). Thus, by commanding that the award be computed from the "collected proceeds" rather than the "tax," Congress purposely allowed the award to be based on *all* the proceeds collected from the government's action.

There is every reason to believe that Congress used these distinct terms deliberately. Whereas (b)(1) specifies the amount of the award,

(b)(5) serves a different purpose: it establishes a monetary threshold, ensuring that mandatory awards only apply in significant cases—such as Target's tax conspiracy. Once a case is sufficiently large under (b)(5), Congress intended the award be made based on the total amount brought in, because it believed that awarding whistleblowers from all the proceeds collected as a result of their information—rather than just one portion—was the proper incentive for encouraging individuals to provide information. In other words, it "believe[d] that an enhanced reward program would be more attractive to future informants." S. Rep. 109-336 at 31 (2006).

The government is also mistaken that the threshold is "based … on amounts collected under Title 26." (Br. 45.) Indeed, the threshold amounts need not be collected at all—(b)(5) requires only that they be "in dispute." *See, e.g.*, *Smith v. Commissioner*, 148 T.C. ___, 2017 WL 2472375 at *7 (June 7, 2017) (holding also that amounts "in dispute" are not limited to those amounts attributable to a whistleblower's information). These amounts can be "in dispute" at the investigatory stage. And, as in Target's case, there can be tax "in dispute" if the government decides to bring a criminal action under title 18. Indeed,

the applicable sentencing guidelines required such a determination. *See* U.S. Sentencing Guidelines Manual § 2T1.9 (2016).

Congress could easily have used the term "tax"—or "under this title"—if it had wanted to limit "collected proceeds" in the manner the government suggests. Though the government nonetheless insists a bright-line limitation to title 26 should be read into the statute, "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

### 3. Section 7623(a)'s proviso regarding "expenses … otherwise provided for by law" does not apply.

The tax court correctly rejected the argument that section 7623(a)'s proviso regarding "expenses … otherwise provided for by law" bars an award based on the forfeitures, because section 7623(a)'s plain language makes clear that the proviso applies only to discretionary awards under section 7623(a), and not to mandatory awards under section 7623(b). (Doc. 78 at 31, JA___.) The clause "in cases where *such expenses* are not otherwise provided for by law" clearly modifies only the first part of the sentence, which provides the Secretary's "authori[ty] to pay *such sums as he deems necessary*." 26 U.S.C. § 7623(a) (emphasis added). In other words, it limits his discretion under

section 7623(a). As we have explained, the award-mandating language of section 7623(b)(1) refers to the "action[s] described in subsection (a)."

Moreover, the example cited by the government—31 U.S.C. § 9705(a)(2)(A)'s discretionary award program—is not naturally characterized as an "expense[] … provided by law."[5] *See Williams v. United States*, 12 Ct. Cl. 192, 199 (1876), *aff'd*, 154 U.S. 652 (1880) (rejecting argument that the language barred award where informant could recover portion of forfeiture under another law). At any rate no such award has been "provided" in these cases. Nor could it be—payments under 31 U.S.C. § 9705(a)(2) can be made only "when funds are appropriated for that purpose," and "Congress has not appropriated funds for such purpose since fiscal year 1997." I.R.M. 9.7.8.18.3 (Dec. 3, 2002). An interpretation that would allow a *discretionary* provision in another statute—let alone one that is effectively defunct—trump awards under section 7623(b) would undo Congress's clearly-expressed intent to make such awards *mandatory*.

[5] 28 U.S.C. § 524(c)(1)(C) is inapplicable, because the IRS is not an "agency participating in the Fund." *Cf.* 31 U.S.C. § 9705(o)(1).

### C. Persons guilty of violating the internal revenue laws or conniving at the same can be—and routinely are—brought to trial and punished under provisions of title 18.

The government contends that the action against Target "involves non-tax laws addressing criminal fines and forfeitures." (Br. 39.) But the statutes at issue are not merely abstract "general provisions," (Br. 40), unmoored from any factual setting. They do not only address criminal fines and forfeitures—they punish particular conduct. Setting aside the absurdity of arguing that a criminal tax conspiracy is not a violation of the internal revenue laws, IRS and DOJ procedures demonstrate how title 18 provisions work in concert with title 26 as a comprehensive system for punishing internal revenue law violations. And, as the record illustrates, when the government used these provisions against Target, it did so squarely for the purpose of punishing its violations of the internal revenue laws—or for "conniving at the same." 26 U.S.C. § 7623(a)(2).

#### 1. The IRS and DOJ-Tax have jurisdiction over title 18 provisions as applied to tax crimes.

The Internal Revenue Code "provides the initial authority for investigating crimes arising under the Internal Revenue laws." I.R.M. 9.1.2.2(1) (Sept. 6, 2013). In particular, it empowers:

> [a]ny criminal investigator … of the Internal Revenue Service whom the Secretary charges with the duty of enforcing any of the criminal provisions of the internal revenue laws, any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary is responsible, or any other law for which the Secretary has delegated investigatory authority to the Internal Revenue Service.

26 U.S.C. § 7608(b)(1). Accordingly, the IRS's own procedures state, "[t]ax crimes are those which are in violation of the criminal statutes of Title 26, Title 18 and/or Title 31 … as applicable to Title 26." I.R.M. 9.5.3.1(1) (Apr. 19, 2006); *see also* I.R.M. 38.1.3.1(1) (Aug. 11, 2004) ("The IRS has jurisdiction to forfeit property under Titles 18, 26 and 31.").

More specifically, the IRS has the authority to investigate—and take appropriate action against—internal revenue violations under the provisions of title 18, including 18 U.S.C. §§ 371, 981, and 1956. *See* I.R.M. 9.1.3.4.8 (May 15, 2008) (tax conspiracies under 18 U.S.C. § 371); Treas. Directive 15-42 ("investigatory authority over violations of 18 U.S.C. 1956" and "seizure and forfeiture authority over violations of 18

U.S.C. 981").[6] Thus, the IRS's "role as enforcer of the Internal Revenue Code" embraces the specific provisions used against Target. (Br. 42.)

The government maintains that because the action against Target was "[a] criminal prosecution conducted by the Justice Department," it "is not naturally characterized as an administrative or judicial action of 'the Secretary' of the Treasury." (Br. 41.) But the government fails to mention that the IRS, as a matter of policy and practice, does not initiate any litigation, regardless of whether it is criminal or civil, or under title 26 or otherwise.[7] Instead, the IRS proceeds with criminal matters by referring them to the Justice Department. *See*, *e.g.*, Treas. Order 150-35.

When a matter cannot be resolved administratively, IRS agents and government attorneys work together to bring an enforcement action to its conclusion. *E.g.*, I.R.M. 9.5.2.1 (Nov. 5, 2004). It is the attorneys in the Tax Division that are charged with conducting, handling, and

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[6] 18 U.S.C. § 1956 itself vests investigatory jurisdiction in "such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate," subject to interagency agreement. 18 U.S.C. § 1956(e).

[7] The IRS must obtain the Attorney General's approval even for civil actions. *See* 26 U.S.C. § 7401. Indeed, the Tax Division represents the IRS in the instant cases.

supervising "[c]riminal proceedings *arising under the internal revenue laws*." 28 C.F.R. § 0.70(b) (emphasis added). Thus, "Tax Division approval is required for *any criminal charge* if the conduct at issue arises under the internal revenue laws, *regardless of the criminal statute(s) used to charge the defendant*." Tax Div. Directive No. 128 (Oct. 29, 2004) (emphasis added). And the Tax Division considers the provisions at issue in these cases to be charges that can be brought in a criminal proceeding arising under the internal revenue laws. *See* C.T.M., *supra*, § 23.00 (18 U.S.C. § 371), § 25.00 (18 U.S.C. § 1956); Tax Div. Directive No. 145 (Jan. 30, 2014) (18 U.S.C. § 981). The government's position in this case is, therefore, at odds with DOJ's longstanding position that tax crimes charged under title 18 arise under the internal revenue laws.

**2. The action against Target was squarely aimed at punishing violations of the internal revenue laws.**

Just as the Tax Division looks to the "conduct at issue" to determine the extent of its authority, so too should this Court consider the substance of the government's action against Target, rather than whether 18 U.S.C. §§ 371, 981, and 3571 are "properly classified as internal revenue laws." (Br. 40.) As the record here vividly

demonstrates, these title 18 provisions are not ancillary to the IRS's role as enforcer of the Internal Revenue Code—they were used to "bring[] to trial and punish[]" Target for "violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a)(2).

The Tax Court correctly found that IRS-CI conducted a criminal investigation of Target, and was involved from the beginning. (Doc. 60 at 14 JA___; Doc. 78 at 27, JA___.) IRS-CI participated in expanding a grand jury to include Target—a request that ultimately had to be approved by the Tax Division. (Ex. 27-J, JA___; Doc. 50 ¶ 11, JA___.) Target conspired to defraud the IRS and violate 26 U.S.C. §§ 7206(1) and 7201. (Doc. 78 at 4, JA___.) As Target admitted, this conspiracy was, in fact, completed. (Doc. 74 Ex. 1-J at 9-10, JA___.) And Target ultimately negotiated a plea agreement with the government whereby it agreed to pay over $74 million in a combination of restitution, fine, and forfeitures. (Doc. 74 Ex. 1-J, JA___) The terms of this agreement were approved by the Tax Division. (*Id.* at 1, JA___.) And it was the IRS that seized the forfeited assets at issue, as the forfeiture complaint indicates, and as implied by the government's insistence that the funds must be

deposited in the Treasury Forfeiture Fund. *See* 31 U.S.C. §§ 9705(d)(2)(A), (o)(1).

Although 18 U.S.C. § 371 can be used to prosecute a variety of conduct, it is also the primary statute applicable to tax conspiracies. *See* C.T.M., *supra*, § 23.02 (because "Title 26 … do[es] not include a statute for the crime of conspiracy … tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371."); I.R.M. 9.1.3.4.8(2) (May 15, 2008) (same). Similarly, forfeitures under title 26 are rare, and would have been difficult in this case because the relevant provisions do not have a tracing provision. *E.g.*, I.R.M. 9.7.13.6.3(1) (Aug. 11, 2003). Title 18 provisions were thus essential to the government ability to pursue Target.

The provision used to impose a fine on Target—18 U.S.C. § 3571(d)—"provides for higher maximum fines than those specified in the statute of conviction," and applies to title 26 offenses as well. C.T.M., *supra*, § 45.01[2]. Under the government's theory, however, if it charged a defendant with a title 26 violation and sought a fine under 18 U.S.C. § 3571(d), that fine would bizarrely not be "collected proceeds,"

simply because it was imposed under a "general provision" of title 18.[8] Yet the government has every incentive to use 18 U.S.C. § 3571(d)—even for convictions under title 26—because it can result in a significantly higher fine. Although no title 26 provision specifies a fine greater than $500,000, the government collected a fine of over $22 million from Target.

The government cannot have it both ways: either the conduct violates the internal revenue laws or it does not. Target engaged in, was charged with, and pleaded guilty to a conspiracy to violate the internal revenue laws. The $74 million collected from Target as a result all stems from this conduct, and is therefore collected proceeds under section 7623. The government offers no explanation for why Congress would have intended the whistleblower award law—which is aimed at serious tax crimes—to have a narrower reach than the IRS and Tax Division's own jurisdiction over the same set of tax crimes.

[8] We address the government's contention that fines collected under title 26 are not "collected proceeds" in Part II, below.

### D. The history and purpose of section 7623—as confirmed by the IRS's prior practice—foreclose the government's interpretation.

As the preceding section makes clear, the idea that the internal revenue violations are enforced exclusively under provisions of title 26 is at odds with the reality of how criminal tax cases are investigated and prosecuted. And the government's interpretation is also belied by the statute's history and purpose—as well as by the IRS's own past practice.

In passing the 1867 law now codified in section 7623(a), Congress could not have contemplated limiting awards based on which title of the U.S. Code was used to collect proceeds in a particular case. Significantly, the forerunners to both section 7623(a) and 18 U.S.C. § 371 were passed by Congress in *the same Act*. Act of Mar. 2, 1867, ch. 169, §§ 7, 30, 14 Stat. 471, 473, 484. The conspiracy provision "was enacted at a time and in a setting which strongly suggest that it was aimed at conspiracies either to commit offenses against the internal revenue or to defraud the United States of internal revenue." Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L. J. 405, 418 (1959); *see also Recent Decisions*, 15 COLUM. L. REV. 543, 544

(1915) (it "was originally part of the Internal Revenue Law"). This is compelling evidence that Congress specifically intended the proceeds from a criminal tax conspiracy to be within the scope of the award law.

The government now seeks to divorce these two provisions—and ignore the substance of Target's conduct—by relying on their subsequent codification. But the government's approach grossly exaggerates what amount to little more than editorial and organizational choices never meant to have the force of law.[9] *See, e.g., United States v. Fehrenback*, 25 F. Cas. 1057, 1058 (C.C.D. La. 1875) (no inferences could be drawn from conspiracy law's subsequent codification). This language has been transmitted and carried forward into the modern Code without any evidence of specific intent to change its original meaning.

To the contrary, both the 1996 and 2006 Acts *expand* the statute's scope. Reports accompanying the 1996 Act make clear that Congress intended the award program to continue to apply to "criminal

[9] Many of the classifications in the U.S. Code are continuations of decisions first made in the Revised Statutes, which specified that "no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed." Rev. Stat. § 5600.

violations." H.R. Rep. 104-506 at 51 (1996). As the tax court rightly observed, "[t]he implication … is that before 1996, the IRS denied whistleblower awards for reporting civil tax deficiencies on the basis that the statute authorized awards only for the reporting of criminal tax violations"—not that Congress intended to restrict awards to taxes. (Doc. 78 at 28 n.18, JA___.) In the 2006 Act, Congress again significantly expanded the award program. At that time, Congress believed that awards under section 7623 were paid based on, among other things, "a percentage of … fines" resulting from the information. S. Rep. 109-336 at 30. It amended the statute with the intent to "enhance[] [the] reward program," *id.* at 31, and it also undid the prior statute's only explicit limitation on "collected proceeds": interest.

Yet the government contends that this history "clarifies that Congress intended the statute to apply solely to violations of the tax laws"—meaning, in the government's view, strictly title 26. (Br. 34.) But the government also contends that the statute does not apply to fines, does not apply to forfeitures, and did not apply to restitution until 2010. Under the government's restrictive interpretation, only amounts assessed as taxes qualify. There is simply nothing left of the "criminal

violations" to which section 7623 has always applied. Because it is at odds with the statutory language and its history, the government's interpretation must fail.

Against this background, committee report language describing section 7623 as "regarding violations of the tax laws" is not determinative or even probative of the issue. As we have explained, the action against Target was one "regarding" tax laws, even if it was accomplished using title 18 provisions. What is at issue here is not whether *any* amount collected under a non-title 26 provision is "collected proceeds," but whether amounts collected as a result from a criminal tax matter are, even if collected under title 18. "Civil violations" fundamentally differ from "criminal violations," and the two cannot be equated in the way the government suggests. While civil enforcement of the internal revenue laws is largely aimed at recovering taxes—and amounts assessed as taxes under title 26—criminal enforcement of those laws regularly relies on title 18 provisions, and is aimed at punishing violators by recovering fines and forfeitures.

The government's interpretation also represents an abrupt departure from its past practice. Until recently, the IRS made awards

based on the entire amount collected from an action, *without regard to the title* of any particular provision used. As it conceded below, "until [1996] … *[t]he source of the funds was not an issue*. For example, if the only money collected was a [title 18] criminal fine … *the Service would still be able to pay an award based on a percentage of that fine*" (Doc. 76 ¶ 12, JA___) (emphasis added).

This practice continued well after 1996. (Doc. 75 Ex. A (Aff. of Robert Gardner), JA___.) Indeed, until 2008, the IRS "included all criminal fines" in collected proceeds. Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 VA. TAX REV. 77, 95 (2012); *see also* I.R.M. 25.2.2.13(a)(1) (Apr. 27, 1999) (award "based on the fine" from "a criminal prosecution"); S. Rep. No. 109-336 at 30 (2006) (noting that under "present law" awards were paid from fines). And the IRS also paid awards from proceeds collected under title 31 provisions it administers. *See Whistleblower 22716-13W*, 146 T.C. at 97 ("the record in this case indicates that the [IRS], prior to 2009, did pay discretionary awards under section 7623(a) based on FBAR recoveries [under title 31].")

The government's sudden change in practice indicates that it is simply engaging in an impermissible attempt to rewrite the statute and its history. The statute's text, history, and purpose require it to apply to tax crimes, and foreclose the government's attempt to restrict awards to civil recoveries, *i.e.*, amounts assessed as taxes under title 26. This Court should reject the government's atextual and ahistorical interpretation.

## II. There is no obstacle to the payment of awards from the entire $74 million the government collected from Target.

The government contends that section 7623(a) requires awards to be paid directly from the collected proceeds, and that it cannot pay an award from the fine and forfeitures, because doing so would conflict with other statutes regarding their use. As demonstrated in Part II.A below, the tax court correctly rejected the government's arguments on the ground that section 7623(a)'s funding proviso, by its own terms, applies only to discretionary awards under section 7623(a). At any rate, the government's arguments would fail even under its theory that the funding language in subsection (a) applies to subsection (b). As shown in Part II.B, the same result would be reached because subsection (a) explicitly provides that "any amount [collected by reason of the

information provided] shall be available for such payments." 26 U.S.C. § 7623(a).

### A. Section 7623(a)'s funding proviso applies only to discretionary awards under section 7623(a).

The Tax Court held that under section 7623(b) "the collected proceeds are to be used only for purposes of calculating the amounts of the award," and need not be paid directly from them. (Doc. 78 at 26.) This holding is correct, because section 7623(a)'s funding language explicitly applies only to "amount[s] payable *under the preceding sentence*." 26 U.S.C. § 7623(a) (emphasis added)." And because that "preceding sentence" is the one authorizing "[t]he Secretary … to pay such sums as he deems necessary," the Tax Court correctly concluded that section 7623(a)'s funding proviso applied only to discretionary awards, and not to the mandatory awards provided under section 7623(b). By contrast, section 7623(b) provides that eligible whistleblowers "shall … receive" an award, and thereby "explicitly instructs the Secretary to pay the whistleblower who qualifies … an award of 15 to 30% of the collected proceeds." (Doc 78 at 29, JA___.)

While the government claims that section 7623(b)'s cross-reference to section 7623(a) "enables the two provisions to be read as

part of an overarching program," (Br. 53), it fails to address the fact that Congress only cross-referenced the "action[s] described in subsection (a)." 26 U.S.C. 7623(b)(1). There is no reason to think that Congress intended to reference anything other than the description of those actions in sections 7623(a)(1) and (2). By contrast, the language the government seeks to import into section 7623(b) relates only to the intragovernmental funding of the awards.

The government also misconstrues the holding below, claiming it "creates a direct conflict between § 7623 and separate statutes governing the use of sums recovered as criminal fines and civil forfeitures." (Br. 48.) But as we have explained, the tax court held only that section 7623(b) requires the payment of an award that is a percentage (in these cases 24%) of the collected proceeds, leaving the government free to fund it from whatever source it prefers. Any purported conflict is created, not by the decisions below, but by the government's stubborn insistence that awards be paid *directly* from a particular pot of money.

Lastly, the government contends that the decision below creates "uncertainty regarding the funding of mandatory awards." (Br. 54.) But

these concerns are not just speculative—they are unlikely ever to occur. 18 U.S.C. § 3571(d) limits criminal fines to "twice the gross [pecuniary] loss." And section 7623 applies not just to the IRS, but to the Secretary, who can draw from the Treasury Forfeiture Fund for "all proper expenses of seizure … including investigative costs incurred by [the IRS]," such as mandatory whistleblower awards. 31 U.S.C. § 9705(a)(1)(A). Moreover, while the government's hypothetical is based on the gross amount of potential section 7623 awards, it subjects those awards to tax withholding at the top rate. *See* I.R.M. 25.2.2.10.4(4) (Aug. 7, 2015). Accordingly, it is difficult to imagine a set of facts where the amount of funds "available" is less than 30% of the collected proceeds.[10] Underscoring the fact that the uncertainty of funding is a red herring is the fact that the IRS has flexibly interpreted "collected proceeds" to include fraudulent refund claims, where the IRS does not actually collect any proceeds. *See* I.R.S. Tech. Adv. Mem. PMTA-2010-62 (Sept. 1, 2010).

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[10] Additionally, the government argues that "X … might come forward and make a claim" for award under 7623. (Br. 55.) But X is an unindicted co-conspirator in the tax conspiracy underlying these cases. X's hypothetical award claim can therefore be "appropriately reduce[d]." 26 U.S.C. § 7623(b)(3).

And in fact, the government concedes that it is able to pay the entirety of the awards ordered below from the $20 million in restitution paid by Target. (Br. 55.) There is therefore no need, on the record before this Court, to reach each possible obstacle to paying an award raised by the government.

### B. Even if section 7623(b) awards must "be paid from the proceeds," section 7623(a) makes them "available for such payments."

As the preceding section makes clear, the Tax Court correctly determined that the government need not pay Petitioners' awards directly from the fines and forfeitures. But even if the government is correct that "[the] rules in subsection (a) … also apply under subsection (b)," (Br. 50), the government's funding arguments fail because subsection (a) explicitly clears any obstacles to paying an award. And even if section 7623 overlaps with other statutes as they relate to criminal fines and forfeitures, they can be construed to give effect to each.

### 1. There is no conflict—section 7623(a) makes collected proceeds "available" for awards notwithstanding other statutes.

The Tax Court rightly noted that the government "desires the Court to impose some, but not all of … section 7623(a) on … section 7623(b)." (Doc. 78 at 29, JA___.) In its singular focus on applying section 7623(a)'s "funding source"—*i.e.*, the collected proceeds themselves—to awards made under section 7623(b), the government entirely neglects subsection (a)'s other rule: that "any amount [collected by reason of the information provided] shall be available for [award] payments." 26 U.S.C. § 7623(a). The meaning of "available" is clear from its context, namely that Congress intended that the Secretary be able to use the funds for the payment of awards under section 7623, notwithstanding any other provision of law.

What the government seems to be suggesting is that Congress somehow intended to narrow the scope of collected proceeds under section 7623 when it established the Crime Victims Fund and the Treasury Forfeiture Fund, and then amended section 7623 in 1996. As the government explained below, the Secretary could pay any award he wanted "until 1996 [when] the statute was amended to provide for

payment of the awards out of collected proceeds." (Doc. 76 ¶ 12, JA___.) It was this change, in the government's view, that "ma[de] it improper, from a fiscal law perspective, to pay an award based on a criminal fine under Title 18, unless there is an exception to the requirement that the fine be deposited into the Crime Victims Fund." (*Id.* ¶ 13, JA___.)

The government's "fiscal law" theory does not hold water. First, the legislative history of the 1996 Act indicates both that section 7623 was always intended to apply to criminal violations, and that Congress believed it was improving the award program. Second, not only is there no relevant exception under 42 U.S.C. § 10601 for title 18 fines in tax cases, there is no exception whatsoever for fines collected under title 26. Third, as we have explained, restitution was not "assessed" under title 26 until 2010. Thus, under the government's theory, Congress "improved" the program by eliminating "criminal violations" as a basis for award payments—an absurd and incongruous result. Indeed, when it amended section 7623 again in 2006, Congress clearly believed that awards were "paid based on … fines." S. Rep. 109-336 at 30 (2006).

The government's interpretation would effectively rewrite section 7623(a) to require that collected proceeds "must be available." But

Congress's command is clear—if funds are collected as a result of a whistleblower's information, then those funds "shall be available" for awards under section 7623. This Court should reject the government's improper attempt to redefine the scope of collected proceeds.

**2. Even if there is a conflict, effect can readily be given to both.**

Nevertheless, the government argues that "[s]ection 7623(b) can be reconciled with 42 U.S.C. § 10601 and 31 U.S.C. § 9705 only if sums recovered as criminal fines [or forfeitures] are not included in 'collected proceeds.'" (Br. 49-50.) As we have argued, the plain language of section 7623, and its history and purpose, compel the conclusion that "collected proceeds" includes criminal fines and forfeitures. *See* Parts I.A & D, *supra*. But the government's attempt to narrow the scope of section 7623 awards fails for the additional reason that the government's construction does not "give effect to the language and intent of both" of the allegedly conflicting statutes. (Br. 49.) The government offers a false choice, whereby effect can only be given to one statute or the other, without any middle ground where the statutes can co-exist. Instead, effect can readily be given to all by construing section 7623 as an exception to 42 U.S.C. § 10601 and 31 U.S.C. § 9705.

42 U.S.C. § 10601 and 31 U.S.C. § 9705 establish general rules "governing the use of fines and forfeitures." (Br. 49.) By contrast, section 7623 is a specific provision applying to a very specific situation, namely awards for proceeds collected as a result of a tax whistleblower's information. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). In such a case, "[t]o eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. ___, 132 S. Ct. 2065, 2071 (2012).

The fact that Congress did not specifically address section 7623 awards when it enacted 42 U.S.C. § 10601 and 31 U.S.C. § 9705 should not be interpreted as an expression of intent to deliberately eliminate criminal fines and forfeitures from the scope of section 7623.[11] As the government admits, section 7623 awards were paid out of appropriated funds until 1996, whereas the Crime Victims Fund and the Treasury Forfeiture Fund were established in 1984 and 1992, respectively. *See*

[11] As the government notes, (Br. 51), 26 U.S.C. § 7809(a) provides that "all taxes and revenues received under the provisions of this title … shall be paid … into the Treasury." Curiously, Congress neglected to specifically except section 7623 awards from this statute.

Victims of Crime Act of 1984, Pub. L. No. 98-473, title II, § 1402, 98 Stat. 2170; Treasury Forfeiture Fund Act of 1992, Pub. L. No. 102-393, title VI, § 638, 106 Stat. 1779. The Funds therefore did not interact with section 7623 until later. And, when Congress turned its attention to the issue, it clearly expressed its intent in section 7623 itself, namely that any amounts collected as a result of a whistleblower's information "shall be available for … payments." 26 U.S.C. § 7623(a).

Simply put, the most practical way of reconciling these statutes is not, as the government urges to restrict "collected proceeds" to amounts that can be assessed as taxes under title 26. Rather, it is to make any collected proceeds "available" for an award, with the balance of any fines and forfeitures going to the relevant Funds. This harmonious reading of the statutes is particularly justified given that a successful and effective whistleblower program benefits the Funds by bringing in additional fines and forfeitures over time.

The government's position is based on a parsimonious interpretation of the relevant statutes, and of "federal revenue protection." The government contends that the IRS would be only keeping a small portion of the $20 million in restitution after paying the

award. But the government hopes the Court will forget the other $54 million paid by Target as a result of its plea agreement—proceeds it would not have collected but for Petitioners.

Notwithstanding the government's remarkably narrow view of "federal revenue protection," section 7623 is also aimed at other purposes, not the least of which is "punishment" and the deterrence of future violations. It was these purposes that Congress sought to further when it determined to pay whistleblowers an award "of the collected proceeds … resulting from the action … any related actions … or from any settlement." 26 U.S.C. § 7623(b)(1).

## CONCLUSION

For the foregoing reasons, the decisions of the Tax Court should be affirmed.

Dated: October 10, 2017

Respectfully submitted,

/s/ Felipe Bohnet-Gomez

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point Century.

Dated: October 10, 2017

/s/ Felipe Bohnet-Gomez
Felipe Bohnet-Gomez

## CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I electronically filed the foregoing brief, together with the Addendum attached thereto, by using the appellate CM/ECF system, which will send notice of such filing to counsel for Appellant. In addition, I caused paper copies of the foregoing to be sent to the Clerk of Court's office and counsel for all parties.

/s/ Felipe Bohnet-Gomez
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# ADDENDUM

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 78. Discovery of Liability and Enforcement of Title
Subchapter B. General Powers and Duties

26 U.S.C.A. § 7623, I.R.C. § 7623

# § 7623. Expenses of detection of underpayments and fraud, etc.

Effective: December 20, 2006
Currentness

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

**(1)** detecting underpayments of tax, or

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

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

**(b) Awards to whistleblowers.**--

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

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

**(A) In general.**--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response

  

to such action, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

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

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

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

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

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

**(B)** if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000.

**(6) Additional rules.**--

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

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

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

**CREDIT(S)**

(Aug. 16, 1954, c. 736, 68A Stat. 904; Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub.L. 104-168, Title XII, § 1209(a), July 30, 1996, 110 Stat. 1473; Pub.L. 109-432, Div. A, Title IV, § 406(a)(1), Dec. 20, 2006, 120 Stat. 2958.)

Notes of Decisions (45)

  

26 U.S.C.A. § 7623, 26 USCA § 7623
Current through P.L. 115-61. Title 26 current through P.L. 115-64.

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