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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 APPEALS FROM THE DECISIONS OF THE
UNITED STATES TAX COURT

INITIAL OPENING BRIEF FOR THE APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The parties to appeal No. 17-1119 are the Commissioner of Internal Revenue, the respondent-appellant, and [redacted], the petitioner-appellee, proceeding as Whistleblower 21276-13W. The parties to appeal No. 17-1120 are the Commissioner of Internal Revenue, the respondent-appellant, and [redacted], the petitioner-appellee, proceeding as Whistleblower 21277-13W. There were no intervenors or amici appearing in the Tax Court, and none have appeared on appeal.

B. Rulings Under Review. The rulings under review are the Tax Court's opinion of June 2, 2015, reported at 144 T.C. 290 (2015), and its opinion of August 3, 2016, reported at 147 T.C. 121 (2016), both authored by Judge Julian I. Jacobs. Final decisions were entered on January 27, 2017.

C. Related Cases. This case has not been before this Court or any other court other than the Tax Court. Counsel are not aware of any

related cases currently pending in this Court or in any other court, as provided in Cir. R. 28(a)(1)(C).

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GLOSSARY

2006 Act	Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006)
Commissioner	Commissioner of Internal Revenue
Doc.	Documents comprising the original record, as numbered by the Clerk of the Tax Court
Husband	Petitioner [redacted]
I.R.C. or Code	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
JA	Deferred joint appendix
Petitioners	[redacted] and [redacted]
Target	[redacted]
TIGTA	Treasury Inspector General for Tax Administration
Treas. Reg.	Treasury Regulation (26 C.F.R.)
Wife	Petitioner [redacted]
X	[redacted]

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STATEMENT OF JURISDICTION

These suits seeking tax whistleblower awards were brought by a husband and wife proceeding anonymously. For the remainder of this

brief, we will refer to them together as petitioners and individually as Husband and Wife.[1]

On August 13, 2013, the Internal Revenue Service (IRS) Whistleblower Office sent letters to Husband and Wife, denying their applications for whistleblower awards under § 7623 of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.).[2] (Doc. 1 at 5, JA___; Doc. 8 at 2, JA___; Doc. 48 at 3, JA___.) On September 12, 2013, within 30 days after the mailing of the denial letters, Husband and Wife filed timely petitions in the Tax Court, contesting the denial of their claims. (Doc. 1, JA___.) *See* I.R.C. § 7623(b)(4). The Tax Court had jurisdiction over the petitions pursuant to §§ 7623(b)(4) and 7442 of the Code.

On January 27, 2017, the Tax Court ordered and decided that Husband and Wife each were entitled to a whistleblower award of

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[1] The Tax Court temporarily sealed the record below. Before the notices of appeal were filed, however, the parties submitted redacted copies of most documents, which were substituted for the unredacted copies, and the record was unsealed. (Doc. 94, JA___.) The trial exhibits remained under seal.

[2] Unless otherwise indicated, all statutory references are to the Code, as amended and in effect with respect to the time in question.

$8,895,803.50. (Doc. 104, JA___.) The Tax Court's decisions are final, appealable orders that dispose of all claims of all parties. The Commissioner filed notices of appeal on April 21, 2017, within 90 days after entry of the Tax Court's decisions. (Doc. 106, JA___.) The appeals are timely under § 7483 of the Code and Fed. R. App. P. 13(a)(1)(A). Jurisdiction over these appeals is conferred on this Court by § 7482(a)(1) of the Code. Because § 7482(b)(1) contains no specific provision addressing the venue of an appeal from a decision of the Tax Court involving § 7623, appellate venue for these appeals lies in this Court. *See* I.R.C. § 7482(b)(1) (flush language).

STATEMENT OF THE ISSUES

1. Whether the Tax Court erred in holding that a criminal fine and civil forfeitures constitute "collected proceeds" on which a whistleblower award is based under Section 7623(b) of the Internal Revenue Code.

2. Whether the Tax Court erred in holding that although Section 7623(b) of the Code requires an award to be calculated based on "collected proceeds," it does not require the award to be paid from them.

STATUTES AND REGULATIONS

The pertinent statute, § 7623 of the Code, is set forth in the addendum to this brief.

STATEMENT OF THE CASE

A. The nature of the dispute and summary of the proceedings

Petitioners Husband and Wife seek tax whistleblower awards under § 7623(b) of the Code, which allows individuals to receive a percentage of the "collected proceeds" resulting from an action based on information they brought to the Secretary's attention. After the IRS Whistleblower Office rejected their applications for whistleblower awards as untimely, Husband and Wife filed separate petitions in the Tax Court. The court consolidated the cases for trial, briefing, and opinion. (Doc. 16, JA___.) A partial trial was held in November 2014. In an opinion published at 144 T.C. 290 (2015), the Tax Court (Judge Julian I. Jacobs) held that petitioners' applications to the Whistleblower Office were timely. (Doc. 60, JA___.)

The parties then reached a partial settlement. (Doc. 74 at 4, JA___.) They agreed that Husband and Wife are eligible for an award, and that the award is to be 24 percent of the "collected proceeds" within

the meaning of § 7623(b). (Doc. 74 at 4, JA___.) The parties also agreed that a $20,000,001 tax restitution payment constituted collected proceeds. (*Id.*) They disagreed, however, as to whether a criminal fine of $22,050,000 and civil forfeitures totaling $32,081,693 constituted collected proceeds. (Doc. 74 at 2-4, JA___.) In other words, the dispute centered on whether petitioners were entitled to receive 24 percent of the $20 million restitution payment, as the Commissioner contended, or instead, 24 percent of the $74 million total, as petitioners claimed.

In a supplemental opinion published at 147 T.C. 121 (2016), the Tax Court (Judge Jacobs) agreed with petitioners that the criminal fine and civil forfeitures constitute collected proceeds for purposes of an award under § 7623(b). (Doc. 78 at 32, JA___.) The court later denied a motion for reconsideration filed by the Commissioner. (Doc. 92 (stamp), JA___.) The court entered decisions implementing its rulings and the parties' partial settlement, determining that Husband and Wife are each entitled to an award of $8,895,803.50. (Doc. 104, JA___.)

B. The facts relevant to this appeal

1. Background

The background facts, as found by the Tax Court after a partial trial or stipulated by the parties, are summarized below.

Husband was arrested in 2009 for his role in a money-laundering conspiracy. He began cooperating with the United States government in the hope of receiving a lighter sentence. (Doc. 50 at 2, JA___; Doc. 60 at 5, JA___.) Under the terms of his guilty plea, Husband agreed to provide truthful and complete information to the Government, including information about any crimes of which he had knowledge. (Doc. 48 at 4, JA___; Doc. 60 at 5, JA___.) Material falsifications or concealment would have violated Husband's plea agreement and could have subjected him to prosecution under 18 U.S.C. § 1001. (Doc. 50 at 4, JA___.) Wife also knew that if she harmed the investigation, Husband would not benefit at his sentencing from her cooperation. (*Id.*)

In the lead up to and as part of his plea agreement, Husband informed the Government that a foreign company ("Target") was helping U.S. taxpayers evade federal income tax. (Doc. 60 at 5-6, JA___.) Although Husband did not have sufficient evidence to prove

this, he knew an officer of Target (X) who did. (*Id.* at 6, JA___.) Husband believed that X could be lured to the United States and persuaded to assist in pursuing Target. (*Id.* at 6-7, JA___.)

Beginning in 2010, Husband and Wife worked with the IRS, FBI, and prosecutors to implement this plan. (*Id.* at 7, JA___.) The plan involved convincing X to agree to assist with a fictional illegal transaction intended to conceal funds from the United States government by moving them to a new offshore bank account. (*Id.* at 7-8, JA___.) Husband helped prepare documents to create the illusion of the fictional transaction. (*Id.* at 8, JA___.) Wife traveled to England twice to meet with X, where she secretly recorded the incriminating conversations and introduced him to an undercover agent. (*Id.* at 9-11, JA___.) Husband recorded incriminating telephone conversations with X and ultimately persuaded him to travel to the United States, where he was arrested. (*Id.* at 11-12, JA___.) X agreed to help the Government pursue Target. When X reneged, Husband persuaded him to keep his commitment. (*Id.* at 12-13, JA___.) X began cooperating and supplied the Government with information about Target's

activities. (*Id.* at 13, JA___.) Husband continued reviewing and verifying information. (*Id.*)

In a superseding indictment, Target was charged with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. (Doc. 60 at 13, JA___.) Target was accused of conspiring with others to defraud the United States by concealing from the IRS more than $1.2 billion in secret accounts held by U.S. taxpayers. (*Id.*) Target pleaded guilty to the charge. (Doc. 60 at 13, JA___; Doc. 78 at 4, JA___.) U.S. government officials praised petitioners' contributions to the effort. (Doc. 60 at 14, JA___.) The IRS and FBI each described petitioners' contributions as essential to the success of the investigation. (*Id.*)

Under the terms of its plea agreement, Target paid the United States a total of $74,131,694. (Doc. 78 at 4, JA___.) That total consisted of (i) tax restitution of $20,000,001, which represented the pecuniary loss to the United States and was to be paid to the IRS; (ii) a criminal fine of $22,050,000 under 18 U.S.C. § 3571; (iii) a civil forfeiture of $15,821,000 under 18 U.S.C. § 981(a)(1)(C), representing Target's gross proceeds from its scheme to defraud the United States; and (iv) relinquishing claims to $16,260,693 that had previously been

forfeited to the United States under 18 U.S.C. § 981(a)(1)(A), based on a violation of 18 U.S.C. § 1956 for money laundering, mail fraud, and wire fraud. (Doc. 74 at 1-2, JA___; Doc. 78 at 5, JA___.)

2. The claims for award and the proceedings in the Tax Court regarding the timeliness of the claims

When Husband and Wife began assisting in the investigation of Target, they were unaware of the IRS's whistleblower-award program, and learned of it only during the investigation from agents. (Doc. 60 at 15, JA___.) In April 2013, after Target had pleaded guilty, Husband and Wife each submitted a Form 211, Application for Award for Original Information, to the IRS Whistleblower Office. (*Id.*) Both claims were rejected as untimely. (*Id.* at 16, JA___.) Husband and Wife each petitioned the Tax Court, which consolidated the cases for trial, briefing, and opinion. (Doc. 16, JA___.) A partial trial was held in November 2014. (Doc. 60 at 4, JA___.)

In a 2015 ruling, the Tax Court held that petitioners' claims were timely. (Doc. 60, JA___.) The court also denied the Commissioner's request to remand the cases to the Whistleblower Office for further consideration. (*Id.* at 28, JA___.) The court retained jurisdiction, but noted that, because the Whistleblower Office had denied the claims

without any substantive review or evaluation of the merits, the parties should be given an opportunity to resolve their differences. (*Id.*)

3. The further proceedings on what constitutes "collected proceeds"

The parties then resolved almost all of the issues that would have been the subject of further proceedings before the Whistleblower Office if the Commissioner's request for a remand had been granted. They agreed that Husband and Wife are eligible for an award and that the award should be 24 percent of the "collected proceeds" within the meaning of I.R.C. § 7623(b). (Doc. 74 at 4, JA___; Doc. 78 at 4, JA___.) They also agreed that the $20,000,001 the IRS recovered in tax restitution is "collected proceeds" under § 7623(b).[3] (Doc. 74 at 4, JA___; Doc. 78 at 5, JA___.) They disagreed, however, on a legal issue: whether the remaining sums the United States received – consisting of criminal fines and civil forfeitures – are also "collected proceeds." (Doc. 74 at 4, JA___; Doc. 78 at 5, JA___.)

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[3] This restitutionary payment was assessed and collected under Title 26 pursuant to I.R.C. § 6201(a)(4)(A), which requires a liability determined in a criminal restitution order to be assessed and collected as a tax.

The Commissioner argued that the plain language of § 7623 makes it clear that only those proceeds assessed and collected under Title 26 may be used to pay a whistleblower award because the statute relates solely to violations of the federal tax laws. (Doc. 78 at 9, JA___.) As a result, the criminal fines and civil forfeitures at issue here are not "collected proceeds" in his view. (*Id.*) The Commissioner further argued that, if such fines and forfeitures could be used to pay whistleblower awards, an irreconcilable conflict would be created between § 7623(b) and provisions elsewhere in the United States Code (*i.e.*, 42 U.S.C. § 10601 (relating to criminal fines) and 31 U.S.C. § 9705(a) (relating to civil forfeitures)) that specify the purposes for which moneys so collected may be used. (Doc. 78 at 9-10, JA___.)

Petitioners likewise contended that the language of § 7623 is clear. (Doc. 78 at 10, JA___.) They asserted, however, that the import of the statute is to the contrary where fines and forfeitures are concerned. They contended that those amounts also constituted collected proceeds because they were included in a settlement payment resulting from an administrative or judicial action taken by the

Secretary and related to acts committed in violation of I.R.C. §§ 7201 and 7206(1). (Doc. 78 at 10, JA___.)

In a 2016 ruling, the Tax Court ruled for petitioners, holding that collected proceeds are not limited to amounts collected under Title 26. (Doc. 78, JA___.) In the court's view, "[t]he language of section 7623(b)(1) is plain." (Doc. 78 at 10, JA___.) It first noted that "Section 7623(b)(1) is straightforward and written in expansive terms." (Doc. 78 at 11, JA___.) The court further observed that the term "collected proceeds" "is not statutorily defined." (*Id.*) Turning to the ordinary meaning of the words used, the court noted that the Supreme Court held, in *Phelps v. Harris*, 101 U.S. (11 Otto) 370, 380 (1879), that the term "proceeds" is "a word of great generality." (Doc. 78 at 12, JA___.) Resorting to dictionary definitions, the Tax Court observed that "proceeds" need not be money, but that the term encompasses what is produced or derived from a transaction. (*Id.*) The court similarly opined that "collect" is also an "expansive" word, meaning to gather together. (*Id.* at 12-13, JA___.)

Against this background, the Tax Court commented, "[w]e are leery of arbitrarily limiting the meaning of an expansive and general

term such as 'collected proceeds.'" (*Id.* at 14, JA___.) In its view, Congress could have chosen to expressly base whistleblower awards on taxes and other amounts assessed and collected under Title 26, "[b]ut it did not. Instead, Congress chose to use a sweeping term 'collected proceeds' as the basis of the award." (*Id.*)

The court went on to examine the context of the statute, which "reinforces our conclusion." (*Id.*) "Congress revealed its intent that the mandatory whistleblower program be an expansive rewards program" by including other "broad and sweeping terms," such as "any administrative or judicial action," "any related actions," and "any settlement in response to such action" in delineating its scope. (*Id.*) The court rejected the Commissioner's reliance on wording in § 7623(a) linking awards to violations of "the internal revenue laws," noting that not all internal revenue laws are contained in Title 26. (Doc. 78 at 16, JA___.) Also inapposite, in the court's view, was language in § 7623(b)(1) referring to collected proceeds as "including penalties, interest, additions to tax, and additional amounts," even though I.R.C. § 6665 calls for such items to be treated as a tax. (Doc. 78 at 18-19, JA___.) The court stressed that the use of the word "including" as a

preface to that list is an indication that the list is not exclusive. (*Id*. at 19-20, JA___.) The court also noted that the word "fine" is sometimes substituted for "penalty" in certain places in the Code, which it considered an indication that the cited list of items might include fines. (*Id*. at 20, JA___.) Finally, the court found it significant (and at odds with the Commissioner's narrow reading of "collected proceeds") that the Commissioner conceded that the restitution payment, which was in substance the tax loss, constituted collected proceeds even though "the list of items deemed to be collected proceeds does not include 'tax.'" (*Id*.)

The Tax Court then held that § 7623(b) requires only that "collected proceeds" be used to calculate the award, without requiring the award to be made from them. (Doc. 78 at 24-26, JA___.) The court acknowledged that § 7623(a) requires discretionary awards to be made from proceeds collected, but it concluded that "Section 7623(b) is different." (Doc. 78 at 25, JA___.) The court relied on differences in the language of the two provisions, such as that the requirement that the award "shall be paid from" a specific funding source appears in § 7623(a) but not in § 7623(b). (Doc. 78 at 25, JA___.) As a result, the court found no impediment to treating criminal fines as "collected

proceeds," notwithstanding that criminal fines for federal offenses must be deposited into the Crime Victims Fund pursuant to 42 U.S.C. § 10601. (Doc. 78 at 26-30, JA___.) The court similarly ruled that the civil forfeitures at issue here constitute "collected proceeds," even though such forfeitures are required to be deposited into the Department of the Treasury Forfeiture Fund under 31 U.S.C. § 9705(a). (Doc. 78 at 30-31, JA___.) Finally, the court dismissed the Commissioner's reliance on a provision in § 7623(a) that precludes an award from being made where a separate awards program exists, as is the case for civil forfeitures under 31 U.S.C. § 9705(d)(2). (Doc. 78 at 31, JA___.) The court termed the argument "flawed" because § 7623(a) relates to discretionary awards, which it considered a different program from the mandatory award program under § 7623(b). (Doc. 78 at 31, JA___.)

Based on its reading of "collected proceeds" and the parties' agreement as to the remaining issues, the Tax Court determined that petitioners are entitled to $17,791,607 – *i.e.*, 24 percent of the full $74,131,694 that Target paid under the terms of its plea agreement. (Doc. 78 at 33, JA___.) The court later denied without comment the

Commissioner's motion for reconsideration. (Doc. 92, JA___.) The court then entered decisions that Husband and Wife were each entitled to half the sum awarded, or $8,895,803.50 each. (Doc. 104, JA___.)

SUMMARY OF ARGUMENT

This appeal involves the calculation of tax whistleblower awards under § 7623(b) of the Internal Revenue Code. A husband and wife seek awards for providing information and assistance to federal authorities that led to the recovery of funds from a foreign company ("Target"). Target pleaded guilty to conspiracy, in violation of 18 U.S.C. § 371, and paid more than $74 million, consisting of: (i) tax restitution; (ii) a criminal fine under 18 U.S.C. § 3571; (iii) a civil forfeiture under 18 U.S.C. § 981(a)(1)(C); and (iv) relinquishing claims to a previous forfeiture under 18 U.S.C. § 981(a)(1)(A). The parties to this case agree that the restitution constitutes "collected proceeds" on which an award is based under § 7623. The parties disagree, however, as to whether the criminal fine and civil forfeitures constitute "collected proceeds." By holding that they do, the Tax Court erred.

1. Section 7623(a) of the Code gives the Secretary of the Treasury the discretionary authority to pay monetary awards, payable out of the

amounts recovered, to individuals who have assisted in bringing to light violations of the federal tax laws. Section 7623(b) makes such awards mandatory in certain circumstances where "the Secretary proceeds with any administrative or judicial action described in subsection (a)." Where that mandate applies, the award is a percentage of the "collected proceeds" resulting from the action. At issue here is the scope of those collected proceeds.

In construing the term "collected proceeds" in § 7623(b)(1) to include a criminal fine and civil forfeitures, the Tax Court failed to construe the statute as a whole. In context, "collected proceeds" in § 7623(b) refers back to § 7623(a): the mandatory award provision is triggered only if the IRS "proceeds with any administrative or judicial action described in subsection (a)." Those actions described in subsection (a) include only actions to recover sums for violations of the internal revenue laws, not fines or forfeitures based on other laws. The Tax Court erred by analyzing the language of subsection (b) in isolation, without reference to how the provision must operate within the larger statutory scheme.

The parallel phrasing of subsections (a) and (b) further undermines the Tax Court's conclusion. When Congress spoke of "collected proceeds" in § 7623(b), it was using shorthand to refer to what it had already outlined in § 7623(a) – "proceeds of amounts collected by reason of the information provided." Congress was building on the existing discretionary awards program in providing for mandatory awards for information leading to the detection of "underpayments of tax" and violations of "internal revenue laws." I.R.C. § 7623(a). The Tax Court, however, repeatedly construed provisions of subsection (b) as bearing no relation to provisions of subsection (a) that should have been regarded as *in pari materia*.

Section 7623(b)(1)'s text, in context, encompasses only sums recovered for violations of Title 26 of the United States Code. The "internal revenue laws" are found in Title 26. The statutes imposing fines (18 U.S.C. § 3571) and forfeitures (18 U.S.C. § 981) – and the predicate criminal offense here of conspiring to "commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose" (18 U.S.C. § 371) –

are all general provisions not properly classified as internal revenue laws.

2. The Tax Court also erred in holding that "collected proceeds" are to be used only for purposes of calculating an award under § 7623(b), but not for purposes of funding such an award. The court's ruling creates a direct conflict between § 7623 and other statutes that require criminal fines and civil forfeitures to be devoted to other purposes. Criminal fines (with certain exceptions) are paid into a special account in the Treasury, the Crime Victims Fund, used for particular purposes. Proceeds from most civil forfeitures are deposited in the Department of the Treasury Forfeiture Fund, likewise used for particular purposes.

Section 7623(a), however, requires that awards 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." The IRS cannot pay mandatory awards "from the proceeds of amounts collected" if those amounts are required by statute to be deposited in separate federal accounts used for other purposes. By construing "collected proceeds" to include criminal fines and civil forfeitures, the

Tax Court's ruling creates a direct conflict with other statutory provisions that require such fines and forfeitures to be devoted to other defined purposes.

The Tax Court's ruling also creates uncertainty regarding the funding of mandatory awards. Congress in 1996 created a specific, permanent appropriation from which whistleblower awards (then solely discretionary) would be drawn. Then, in 2006, Congress created mandatory awards by adding new subsection (b) to § 7623 and denominating the existing, discretionary awards provision as subsection (a). Nothing in the statute or the legislative history suggests that, when Congress created mandatory awards, it intended to decouple them from the permanent indefinite funding authority.

The Tax Court's unduly broad construction of the statute could perversely result in the possibility that the IRS will have insufficient collections even to pay all mandatory awards, let alone retain any of the unpaid taxes for which it pursued the action. The Tax Court's ruling therefore undermines the primary objective of § 7623: federal revenue protection.

ARGUMENT

I

The Tax Court erred in holding that a criminal fine and civil forfeitures constitute "collected proceeds" on which a whistleblower award is based under Section 7623(b) of the Internal Revenue Code

Standard of review

The issue presented is one of law, reviewable de novo. *See Byers v. Commissioner*, 740 F.3d 668, 675 (D.C. Cir. 2014) ("we apply *de novo* review to the Tax Court's determinations of law"); *Andantech L.L.C. v. Commissioner*, 331 F.3d 972, 976 (D.C. Cir. 2003).

A. Whistleblower awards for tax law violations

The tax whistleblower program is intended to protect the nation's revenue by helping the IRS detect and deter tax noncompliance and avoidance. Since 1867, federal law has authorized whistleblower awards to informants providing information to internal revenue officials about violations of federal tax law. *See* Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (enacting the first forerunner of § 7623(a)). Until 2006, payment of awards under I.R.C. § 7623 was entirely discretionary with the IRS. There was no judicial review of the denial of an award unless the informant could establish a contract with the IRS fixing a

specific award amount, in which case there was Tucker Act jurisdiction over the contract. *See Krug v. United States*, 168 F.3d 1307, 1310 (Fed. Cir. 1999); *Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988); *DaCosta v. United States*, 82 Fed. Cl. 549 (2008).

In 2006, however, Congress made significant amendments to § 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"). The amendments were prompted by a report issued by the Treasury Inspector General for Tax Administration (TIGTA) at the request of the Senate Finance Committee. *See* S. Rep. No. 109-336, at 31 (2006). The TIGTA report concluded that the existing rewards program had significantly contributed to the enforcement of the tax laws, but that the program would be more effective if procedures were centralized and standardized and managerial oversight were increased. *See* Treasury Inspector General for Tax Administration, *The Informants' Rewards Program Needs More Centralized Management Oversight*, Report No. 2006-30-092 (June 6, 2006) (available at www.tax-whistleblower.com/resources/200630092fr.pdf).

As relevant here, the main features of the 2006 Act were to establish an IRS Whistleblower Office and to provide for the making of mandatory, as opposed to discretionary, awards in certain circumstances. Congress designated the existing provision of § 7623 as subsection (a) and inserted new provisions at subsection (b). Section 7623(a) preserves the IRS's authority to pay awards – discretionary awards – as it had the discretion to do under prior law, by authorizing the IRS (under regulations) to pay awards from proceeds collected when such awards are not otherwise authorized by law.

In a new provision, § 7623(b), Congress obliges the IRS to make awards – mandatory awards – in certain circumstances. To that end, § 7623(b)(5) provides that a whistleblower is eligible for a nondiscretionary award with respect to any action, against any taxpayer, "if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000." I.R.C. § 7623(b)(5)(B).[4] If so,

[4] In addition, in the case of a taxpayer who is an individual, the statute applies only if such individual's gross income exceeds $200,000 for any taxable year subject to such action. I.R.C. § 7625(b)(5)(A). If a claim does not satisfy the monetary thresholds of § 7625(b)(5), no award is required to be paid under § 7623(b), but the IRS retains discretion to pay an award under § 7623(a).

and the Government recovers "collected proceeds" attributable to the whistleblower's information, the whistleblower will (subject to certain conditions) receive an award of "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." I.R.C. § 7623(b)(1).

Section 7623 therefore envisions the granting of awards to whistleblowers, based upon the amount recouped, and depending upon the utility of the whistleblower's information in obtaining the recovery.[5] The dispute here involves the precise contours of the recovery that is the base for an award under § 7623(b). The Commissioner argued that "collected proceeds" upon which a mandatory award is made under § 7623(b)(1) is limited to amounts collected under Title 26, *i.e.*, the Internal Revenue Code, which would encompass not just tax, interest, penalties, additions to tax, and additional amounts, but also court-

[5] In the latter regard, § 7623(b)(1) provides that the amount of the award is to depend "upon the extent to which the individual substantially contributed to such action." That issue has been settled in this case.

ordered restitution, which is assessed and collected as a tax under I.R.C. § 6201(a)(4). Petitioners contended, however, and the Tax Court agreed, that "collected proceeds" is not limited to amounts collected under Title 26, but also includes the criminal fine and civil forfeitures imposed on Target under Title 18.

As we explain below, the Tax Court committed several mistakes in construing the statute. The court refused to read the statute as a whole, even though the context and the overall statutory goal required doing so. *See* Part B, *infra*. The Tax Court erroneously sided with the whistleblowers in concluding that the award base is not limited to amounts collected under the federal tax laws, or specifically, Title 26 of the United States Code. *See* Part C, *infra*. Nor can the court's ruling be reconciled with the statutory structure of § 7623. *See* Part D, *infra*. The Tax Court's construction also runs afoul of the limitation that an award is payable only where none is otherwise provided. *See* Part E, *infra*. Finally, the Tax Court erred in refusing to apply to § 7623(b) the limitation contained in § 7623(a) that "[a]ny amount payable . . . shall

be paid from the proceeds of amounts collected by reason of the information provided.[6]

B. In construing "collected proceeds," the Tax Court failed to construe the statute as a whole

The Tax Court's interpretation of "collected proceeds" – sweeping beyond recoveries under Title 26 to encompass recoveries from criminal fines and civil forfeitures under other federal laws – is erroneous. The starting point for statutory construction is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Section 7623(a) of the Code gives the IRS discretionary authority to pay monetary awards, payable out of the amounts recovered, to individuals who have assisted in bringing to light violations of the federal tax laws. Section 7623(b), in turn, makes such awards mandatory in certain circumstances, providing in relevant part:

> If the Secretary proceeds *with any administrative or judicial action described in subsection (a)* based on information

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[6] Because the Tax Court treated this last aspect of its decision as a separate issue, we refute it in Argument II, *infra*.

> 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.

I.R.C. § 7623(b)(1) (emphasis added). At issue here is the scope of those "collected proceeds."

The Tax Court looked outside § 7623 to rely primarily on the ordinary meanings of "collected" and "proceeds," both of which it determined are expansive. (Doc. 78 at 12-13, JA___.) But, in context, "collected proceeds" in subsection (b) refers back to subsection (a), the previously enacted provision authorizing discretionary awards. Section 7623(a) provides:

> 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*.

I.R.C. § 7623(a) (emphasis added). Courts do not examine statutory words "in isolation," as "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *Nat'l Rifle Ass'n of America, Inc. v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000).

Under an express cross-reference, § 7623(b)(1) is triggered only if the IRS "proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual." In that event, the individual is to receive an award as provided (and limited) in the further provisions of the statute. The term "collected proceeds" in subsection (b)(1) therefore means proceeds collected from the kinds of actions described in subsection (a).

Those actions described in subsection (a) include only actions to recover sums for violations of the federal tax laws. Section 7623(a)(2) refers expressly to "violati[ons]" of "the internal revenue laws." And the reference in § 7623(a)(1) to "detecting underpayments of tax" also naturally encompasses failures to pay taxes that those laws require. By enacting subsection (b), Congress therefore created an additional

incentive to detect "underpayments of tax" and violations of "internal revenue laws." I.R.C. § 7623(a). In other words, Congress built on the existing discretionary awards program to provide for mandatory awards for information leading to the detection of tax underpayments and violations of "internal revenue laws" and resulting collections. The recoveries Congress sought to reward were those stemming from violations of the federal tax laws contained in Title 26, not from violations of other laws.

In this case, however, the Tax Court repeatedly construed provisions of § 7623(b) as bearing no relation to provisions of § 7623(a) that should have been regarded as being *in pari materia*. *See Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). In so doing, the court violated a cardinal rule of statutory interpretation. "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." *FDA v. Brown & Williamson,* 529 U.S. at 132. "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *Id.* at 133 (internal

citations omitted). By disregarding this approach, the Tax Court misconstrued the meaning of "collected proceeds."

The Tax Court looked primarily to dictionary definitions to define the statutory term "collected proceeds." "Proceeds," it first observed, "is 'a word of great generality'" (Doc. 78 at 12, JA___, quoting *Phelps v. Harris*, 101 U.S. (11 Otto) 370, 380 (1879)), while "[t]he definition of 'collect' is similarly expansive" (Doc. 78 at 12, JA___). But the court lost sight of the fact that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The court professed itself to be "leery of arbitrarily limiting the meaning of an expansive and general term such as 'collected proceeds.'" (Doc. 78 at 14, JA___.) But the court's analysis was flawed because the dictionary definition of "isolated words . . . does not account for the governing statutory context." *Bloate v. United States*, 559 U.S. 196, 205 n.9 (2010); *see also Cellular Telecomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003) ("meaning varies with context" and a dictionary definition "by no means tell us" what a term means "in every statutory context"); A. Raymond Randolph, *Dictionaries, Plain Meaning, & Context in Statutory Interpretation*, 17 Harv. J. Law & Pub.

Policy 71, 72-74 (1994) ("statutes can be interpreted accurately only in a fairly comprehensive context" and "dictionaries do not provide context").

The words "proceeds" and "collected" in § 7623(b) previously appear in a phrase in § 7623(a), providing that awards are to be paid from the "proceeds of amounts collected by reason of the information provided." And those awards expressly flow from detecting "underpayments of tax" under § 7623(a)(1) and violations of "internal revenue laws" under § 7623(a)(2). In consequence, when Congress spoke of "collected proceeds" in § 7623(b), it was using shorthand to refer to what it had already outlined in § 7623(a) – "proceeds of amounts collected by reason of the information provided." Those proceeds flow from the information given by the whistleblower regarding tax-law violations.

The parenthetical list appearing directly after "collected proceeds" in § 7623(b)(1), *i.e.* "(including penalties, interest, additions to tax, and additional amounts)," further undermines the Tax Court's reading of the statute. Each of those items is a term of art under Title 26. *See, e.g.*, I.R.C. § 6665(a)(2) ("any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax,

additional amounts, and penalties provided by this chapter"); *Whistleblower 22716-13W v. Commissioner*, 146 T.C. 84, 95 (2016) ("additional amounts" "refers exclusively to the civil penalties enumerated in chapter 68, subchapter A" of the Code). The terms "penalties," "additions to tax," and "additional amounts" each have a limited meaning under the Code – a meaning that encompasses neither criminal fines nor civil forfeitures.

Although, as the Tax Court noted, the provision in § 7623(b)(1) that "collected proceeds" "includ[es]" those items arguably signifies that the list is not exhaustive, it does not follow that Congress intended to include all sums the United States recovers – even fines and forfeitures, which are not listed. (Doc. 78 at 19-20, JA___.) As the Tax Court observed in another recent case, the parenthetical list "notably omits the word 'tax.'" *Whistleblower 22716-13W,* 146 T.C. at 97. It is therefore reasonable to infer that "tax" was the only item missing from the list, because it went without saying. In addition, because the 2006 Act had just repealed a proviso excluding interest from the award base, Congress may have considered it necessary to make clear that

"penalties, interest, additions to tax, and additional amounts" were includable in the amount of the recovery eligible for an award.

Far from it being "plain" (Doc. 78 at 10, JA___) that "collected proceeds" are not limited to amounts collected from violations of Title 26, as the Tax Court held, § 7623 read in its entirety compels the opposite conclusion. It therefore matters less that "collected" and "proceeds" can be broadly defined, standing alone, than that they take their meaning from the other statutory language that limits the scope of what eligible collections proceed from: violations of the tax laws.

C. The Tax Court erred in failing to limit the award base to recoveries for violations of Title 26 of the United States Code

Construing the statute as a whole, awards under § 7623 are based only on sums recovered for violations of the tax laws. As we have explained, subsection (b) provides for mandatory awards "[i]f the Secretary proceeds with any administrative or judicial action described in subsection (a)." Subsection (a), in turn, permits awards for information leading to the detection of "underpayments of tax" or violations of the "internal revenue laws." *See* Argument I.B, *supra*.

That language limits the award base to recoveries for violations of Title 26.

The term "underpayments of tax" in § 7623(a) plainly relates solely to the federal tax laws. Even if this term were ambiguous, the legislative history behind the insertion of this phrase in 1996 (as part of the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, tit. XII, § 1209(a), 110 Stat. 1452, 1473 (1996)), clarifies that Congress intended the statute to apply solely to violations of the tax laws. Before its amendment in 1996, § 7623 authorized the Secretary "to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for 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." I.R.C. § 7623 (1995).

Congress in 1996 added "detecting underpayments of tax" as a basis for making whistleblower awards to clarify that information pertaining to civil, as well as criminal, violations can form the basis of an award. *See* H.R. Rep. No. 104-506, at 51 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1174 ("The bill [amending I.R.C. § 7623] clarifies

that rewards may be paid for information relating to civil violations, as well as criminal violations."); H.R. Conf. Rep. No. 104-350, at 1400 (1995) ("The House bill [amending I.R.C. § 7623] clarifies that rewards may be paid for information relating to civil violations, as well as criminal violations."). Because Congress used the specific language "underpayments of tax" to make this clarification, when these congressional reports refer to "violations," they clearly refer to violations of the tax laws. It follows that Congress also intended the statute's original language regarding violations of "internal revenue laws" to refer to violations of the tax laws, both civil and criminal.

The reports accompanying the 2006 amendments to § 7623 likewise confirm that Congress intended the statute to apply to violations of the tax laws. *See* S. Rep. No. 109-336, at 31 (2006) ("The provision [amending I.R.C. § 7623] reforms the reward program for individuals who provide information regarding violations of the tax laws to the Secretary."); H.R. Rep. No. 109-203, at 1166 (2006) ("The Senate amendment reforms the reward program for individuals who provide information regarding violations of the tax laws to the Secretary."); Staff of the Joint Comm. on Taxation, 109th Cong.,

General Explanation of Tax Legislation Enacted in the 109th Congress at 745 (2007) ("The provision [amending I.R.C. § 7623] reforms the reward program for individuals who provide information regarding violations of the tax laws to the Secretary.").

"Internal revenue laws" is not defined in § 7623 or any other provision of the Internal Revenue Code, although the phrase frequently appears. *E.g.*, I.R.C. § 6301 (providing that the Secretary "shall collect the taxes imposed by the internal revenue laws."); I.R.C. § 6065 (referring to returns, etc., "required to be made under any provision of the internal revenue laws or regulations" to be made under penalty of perjury); I.R.C. § 1400S(e) (authorizing the Secretary to make such adjustments "in the application of the internal revenue laws" as necessary to prevent taxpayers from losing tax benefits by reason of specified hurricanes); I.R.C. § 7212 (creating an offense for "Attempts to Interfere with Administration of Internal Revenue Laws" for, among other things, blocking an official acting "under this title.").

Other parts of the United States Code, however, clarify that "internal revenue laws" refers to Title 26 and, therefore, to federal tax laws. The statute on federal rulemaking procedures, for instance,

mentions the "internal revenue laws of the United States," and explains that "[t]he internal revenue laws of the United States, referred to in subsec. (a), are classified generally to Title 26, Internal Revenue Code." 5 U.S.C. § 603 note. Similarly, the law applying United States laws (with the exception of the "internal revenue laws") to Puerto Rico states that "[t]he internal revenue laws of the United States, referred to in text, are classified generally to Title 26, Internal Revenue Code." 48 U.S.C. § 734 note; *see also* 48 U.S.C. § 1421h note ("The internal-revenue laws of the United States, referred to in text, are classified generally to Title 26, Internal Revenue Code."); 49 U.S.C. § 80305 note ("The internal revenue laws, referred to in text, are classified generally to Title 26, Internal Revenue Code."); 50 U.S.C. App. § 526 note ("The internal revenue laws of the United States, referred to in subsec. (c), are classified generally to Title 26, Internal Revenue Code."). *See, e.g.*, *United States v. One 1957 Ford Tudor Fairlane Victoria*, 161 F. Supp. 232, 232-33 (D. Md. 1958) (including specific tax laws under umbrella of "internal revenue laws"); *see also, e.g.*, Exec. Order No. 10289, 16 Fed. Reg. 9499 (Sept. 19, 1951) (as amended) (using term "internal revenue laws" to refer to laws that impose taxes).

To be sure, as the Tax Court pointed out, the tax laws have not always been codified, and the enactment of the initial whistleblower statute predated such codification. (Doc. 78 at 16, JA___.) The critical fact remains, however, that the internal revenue laws are now overwhelmingly, if not entirely, codified, and are found in Title 26. Indeed, new Treasury regulations, adopted prospectively in 2014 (and therefore not applicable in this case), interpret the scope of the whistleblower award program as limited to violations of Title 26. Treas. Reg. (26 C.F.R.) § 301.7623-2(d)(1); *see* T.D. 9687, 79 Fed. Reg. 47,624, 47254 (preamble) (Aug. 12, 2014) (explaining limitation to Title 26).[7]

The Tax Court also countered that some provisions affecting taxation "are found outside title 26," such as § 530 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2885 (providing certain employment tax relief), § 3463(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat.

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[7] The new regulation is not at issue in this case. The Tax Court's conclusion that "collected proceeds" are not limited to collections under Title 26 is obviously at odds with the regulation. For the many reasons set forth in this brief, the Commissioner's interpretation of the statute is the more enlightened one. At a minimum, however, the Tax Court is wrong that the language of § 7623(b)(1) is "plain." (Doc. 78 at 10, JA___.) The statute is at least ambiguous in this regard.

685, 767 (requiring the Commissioner to include the last day for filing a petition in Tax Court on a notice of deficiency), and the provision establishing the Whistleblower Office itself, 2006 Act § 406(b), 120 Stat. at 2959-60. (Doc. 78 at 16-17, JA___.) But the cited provisions are beside the point, because none gives rise to collected proceeds.

In fact, the question whether provisions affecting taxation "are found outside title 26" (Doc. 78 at 16, JA___) is a red herring. This case does not present the question whether "collected proceeds" encompass tax-related provisions codified outside Title 26 (or not codified at all). Instead, this case involves *non-tax* laws addressing criminal fines and civil forfeitures.[8] The statutes imposing fines (18 U.S.C. § 3571) and forfeitures (18 U.S.C. § 981) – and the predicate criminal offense of conspiring to "commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for

[8] Likewise, it has no relevance here that 31 U.S.C. § 5314 is a "related statute" under I.R.C. § 6103, making the disclosure of taxpayer information permissible for tax administration purposes. (Doc. 78 at 18 n.15, JA___, citing *Hom v. United States*, 2013 WL 5442960, *2 (N.D. Cal. 2013), *aff'd*, 645 F. App'x 583 (9th Cir. 2016).) *See* I.R.C. § 6103(b)(4), (h)(1). Section 7623 applies to detecting "underpayments of tax" and violations of "internal revenue laws," not to detecting violations of "related statutes."

any purpose" (18 U.S.C. § 371) – are all general provisions not properly classified as internal revenue laws.

Here, the Tax Court did not hold that 18 U.S.C. §§ 371, 981 or 3571 are internal revenue laws. And, indeed, they are not. The court nevertheless found it "especially illuminating" that I.R.C. § 6531, which establishes periods of limitation on criminal prosecutions, refers to 18 U.S.C. § 371. (Doc. 78 at 17, JA___.) But by distinguishing between "offenses arising under the internal revenue laws" on the one hand, and "offenses arising under" 18 U.S.C. § 371 on the other, § 6531 undermines, rather than supports, the Tax Court's conclusion. I.R.C. § 6531(8).

Title of 18 U.S.C. § 371 is a broad conspiracy statute that prohibits both (i) conspiracies to commit a specific offense against the United States and (ii) conspiracies to defraud the United States in any manner or for any purpose. *See United States v. Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001). Here, Target pleaded guilty to a one-count superseding indictment that charged it with both conspiring to defraud the United States and with conspiring to commit offenses against the

United States, specifically violations of I.R.C. § 7206(1) and 7201. (Doc. 78 at 4, JA___.)

To the extent the Tax Court suggested that 18 U.S.C. § 371 is an internal revenue law, the court erroneously conflated a conspiracy with its object. (Doc. 78 at 17-18, JA___.) "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." *Braverman v. United States*, 317 U.S. 49, 54 (1942). The contours of a conspiracy and the dangers it creates are often far broader than the substantive offense that is its immediate aim. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). And because an agreement is the essence of the crime, a conspiracy "may exist and be punished whether or not the substantive crime ensues." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

The language of § 7623(b)(1), referring to recoveries that occur when "the Secretary proceeds with any administrative or judicial action described in subsection (a)," also supports this conclusion. A criminal prosecution conducted by the Justice Department that alleges a violation of 18 U.S.C. § 371 is not naturally characterized as an administrative or judicial action of "the Secretary" of the Treasury. In

combination with the other statutory language, including the focus by § 7623(a)(1) and (2) on violations of internal revenue laws, the provision's reference to "the Secretary" reinforces the conclusion that "collected proceeds" are limited to the types of recoveries that the IRS could obtain in its role as enforcer of the Internal Revenue Code.

Criminal fines and civil forfeitures are not "collected proceeds" under § 7623 for an additional reason: they are not "available" to pay whistleblower awards, as the statute requires. I.R.C. § 7623(a). Criminal fines (with certain exceptions) are paid into a special account in the Treasury, the Crime Victims Fund, used for particular purposes. *See* 42 U.S.C. § 10601(b)(1). Proceeds from most civil forfeitures are deposited in the Department of the Treasury Forfeiture Fund, likewise used for particular purposes. *See* 31 U.S.C. § 9705. Construing "collected proceeds" to include criminal fines and civil forfeitures therefore creates a clear conflict with other statutory provisions that require such fines and forfeitures to be devoted to other defined purposes. *See* Argument II, *infra*.

D. The Tax Court's ruling cannot be reconciled with the statutory structure

By isolating specific language in § 7623(b)(1), the Tax Court reached a conclusion that cannot be squared with the statutory structure. Under the Commissioner's interpretation of the statute, the provisions of § 7623 work together: subsection (a) (titled "in general") sets out a general rule governing whistleblower awards, making awards available on a discretionary basis, to be calculated based on sums recovered for tax-law violations. Subsection (b) then makes awards mandatory – within a certain range measured as a percentage of the same recovery – if specified criteria are satisfied. This interpretation is consistent with the legislative history, which refers to "reform[ing]" the reward program by establishing a "floor" and a "cap[ ]" on available rewards if the IRS moves forward with an administrative or judicial action, rather than to establishing a separate and independent program for mandatory awards. S. Rep. No. 109-336, at 31; H.R. Rep. No. 109-203, at 1166; *General Explanation of Tax Legislation Enacted in the 109th Congress*, *supra* at 745.

By contrast, the Tax Court's reading envisions one regime for discretionary awards from recoveries for tax-law violations, but a

separate regime for mandatory awards – in which mandatory awards are calculated as a percentage of a different, potentially much larger base that also includes criminal fines and civil forfeitures. The court erred by analyzing the language of subsection (b) in isolation, without reference to how the provision must operate within the larger statutory scheme.

The monetary threshold established by § 7623(b)(5)(B) illustrates the flaws in the Tax Court's reasoning. In order for a whistleblower to qualify for a mandatory award, § 7623(b)(5)(B) requires that "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000." In *Whistleblower 22716-13W*, 146 T.C. at 95, the Tax Court held that "additional amounts" is a term of art that refers to the civil penalties set forth in Subchapter A of Chapter 68 of the Internal Revenue Code. As a result, the court correctly held that civil penalties imposed by 31 U.S.C. § 5321 for the failure to file a report of foreign bank accounts (FBAR) are not counted for purposes of ascertaining whether the $2 million threshold has been met. *Id.* at 100.

Against this backdrop, the Tax Court's decision in this case results in an anomaly. The court did not explain why Congress would establish

a threshold limitation of $2 million based solely on amounts collected under Title 26, but at the same time allow the award to be computed based on other amounts, including fines and forfeitures. The provisions of § 7623(b) were all added by the 2006 Act and should operate in harmony. And under the Commissioner's interpretation of the statute, they do: the amounts used to determine whether an individual is entitled to a mandatory award are the same amounts that make up the award base. The Tax Court's vision of two separate award programs is unsound.

E. The Tax Court erred in refusing to apply the proviso that an award is payable only where none is otherwise provided

The Tax Court's ruling is also inconsistent with the statutory limitation authorizing awards only "in cases where such expenses are not otherwise provided for by law." I.R.C. § 7623(a). This limitation recognizes that, when Congress has in place another awards program, that program, rather than § 7623, will apply. Section 9705 of Title 31, U.S.C., establishes a specific statutory scheme providing for whistleblower awards in cases of civil forfeiture under any law other than I.R.C. §§ 7301 and 7302. Awards of monies deposited in the

Department of the Treasury Forfeiture Fund may be used by the Secretary of the Treasury, in his discretion, for whistleblower payments, up to $50 million per year. 31 U.S.C. § 9705(a)(2), (g). Similarly, under 28 U.S.C. § 524(c)(1)(C), the Attorney General has the discretion to make awards for whistleblower information that leads to a civil or criminal forfeiture by participating agencies. Unless the Attorney General personally approves and Congress is notified, however, such payments cannot exceed the lesser of $500,000 or one-quarter of the amount realized by the United States, an amount vastly lower than was allowed respecting the forfeiture here. 28 U.S.C. § 524(c)(2).

There is no reason why Congress would have applied the limitation on duplicative award programs to discretionary awards under § 7623(a) only, and not also to mandatory awards under § 7623(b). Yet the Tax Court refused to apply this limitation to the entire statute. Its failure to do so creates an unwarranted anomaly. Where, as here, another statute provides for payment of awards for information leading to collection of monies, then awards paid from those monies may not be made under § 7623.

In sum, the Tax Court's broad interpretation of "collected proceeds" in § 7623(b) is erroneous. The face of the statute, its legislative history, and the statutory structure demonstrate that § 7623(b) encompasses only sums recouped for violations of the internal-revenue laws, not fines or forfeitures based on other laws.

II

The Tax Court erred in holding that "collected proceeds" are to be used only for purposes of calculating an award under Section 7623(b), but not for purposes of funding such an award

Standard of review

This issue of statutory construction presents a question of law, reviewable de novo. *See Byers*, 740 F.3d at 675; *Andantech*, 331 F.3d at 976.

A. The Tax Court's ruling creates an unwarranted conflict between Section 7623 and other statutes that require criminal fines and civil forfeitures to be devoted to other purposes

The Tax Court held, as a separate issue, that although "collected proceeds" are used to calculate a whistleblower award under § 7623(b), they need not be used to pay that award. (Doc. 78 at 24-26, JA___.) In the court's view, § 7623(b) "sets forth how to calculate the

whistleblower's award," but is "[u]nlike subsection (a), which requires that an award 'shall be paid from' a specific funding source." (Doc. 78 at 25, JA___.) Once again, the Tax Court erred in envisioning "two distinct whistleblower programs" that "provide awards to whistleblowers via two subtly different mechanisms." (Doc. 78 at 24, JA___.)

The Tax Court's holding creates a direct conflict between § 7623 and separate statutes governing the use of sums recovered as criminal fines and civil forfeitures. Criminal fines (with certain exceptions) are paid into a special account in the Treasury, the Crime Victims Fund, used for particular purposes. *See* 42 U.S.C. § 10601(b)(1). Although 42 U.S.C. § 10601(b)(1)(A) expressly exempts certain fines to make them available for whistleblower awards by the Secretary in other contexts (fines under § 11(d) of the Endangered Species Act, 16 U.S.C. § 1540(d) and § 6(d) of the Lacey Act Amendments of 1981, 16 U.S.C. § 3375(d)), there is no exemption for awards under § 7623. Nor does § 7623 explicitly allow the payment of awards from fines. *Cf.* 16 U.S.C. § 1540(d); 16 U.S.C § 3375(d). Proceeds from most civil forfeitures are

similarly deposited in the Department of the Treasury Forfeiture Fund, likewise used for particular purposes. *See* 31 U.S.C. § 9705.

Section 7623(a), however, requires that awards "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." The IRS cannot pay mandatory awards "from the proceeds of amounts collected" if those amounts are required by statute to be deposited in separate federal accounts used for other purposes. The Tax Court's reading of § 7623 cannot be reconciled with the existence and import of the statutes governing the use of fines and forfeitures, demonstrating that it read "collected proceeds" far too broadly.

Deeming two statutes to conflict is "a disfavored construction." *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997) (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994)). Instead, the courts attempt to construe two potentially conflicting statutes so as to give effect to the language and intent of both. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Section 7623(b) can be reconciled with 42 U.S.C. § 10601(b)(1) and 31 U.S.C. § 9705 only if

sums recovered as criminal fines and civil forfeitures are not included in "collected proceeds." *See* Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 Va. Tax Rev. 77, 115-16 (2012). By construing "collected proceeds" to include criminal fines and civil forfeitures, the Tax Court's ruling creates a clear and unwarranted conflict with other statutory provisions that require such fines and forfeitures to be devoted to other defined purposes.

B. The Tax Court's ruling creates uncertainty regarding the funding of mandatory awards

The Tax Court attempted to resolve the statutory conflict by holding that § 7623(a)'s "paid from the proceeds" proviso does not apply to mandatory awards under § 7623(b). (Doc. 78 at 26, JA___.) Rather than reading § 7623 as a coherent whole that lays down rules in subsection (a) that also apply under subsection (b), the Tax Court stressed that "[t]he difference in wording between subsections (a) and (b) of section 7623 is striking." (Doc. 78 at 25, JA___.) It reasoned that "[h]ad Congress sought to require that the section 7623(b) award payment be drawn from the collected proceeds, it could and would have done so, such as by incorporating the wording of subsection (a). But it

did not." (Doc. 78 at 25, JA___.) The court seized upon these minor differences in language in order to reach an unwarranted result.

As we have explained, the court's view of § 7623 as creating two separate, independent schemes of whistleblower awards is unsound. *See* Argument I.B & D, *supra*. The court's view that the "paid from the proceeds" limitation applies only to discretionary awards under subsection (a) but not mandatory awards under subsection (b) exacerbates the difficulties. The history of § 7623 illustrates the problem.

I.R.C. § 7809(a) generally provides that all tax collections are to be paid into the Treasury. Before § 7623 was amended in 1996, the IRS paid whistleblower awards out of its appropriated funds, if available. The statute "authorized" the Secretary "to pay such sums, not exceeding in the aggregate the sum appropriated therefor" to reward information regarding tax-law violations. I.R.C. § 7623 (1995). When appropriated funds were not available, the IRS and whistleblowers were forced to seek supplemental appropriations in advance of a particular whistleblower award. The absence of a guaranteed funding stream threatened to undermine the efficacy of the whistleblower program.

In response, Congress in 1996 created a specific, permanent appropriation from which whistleblower awards would be drawn. It did so by adding a sentence to the end of § 7623 to provide 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." *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat. 1452, 1473 (1996). The new language ensured that a source for awards would always be available when a recovery is made. By linking payments to the proceeds of amounts collected, the new language also furthered the whistleblower program's goal of protecting the revenue.

Then, in 2006, Congress created mandatory awards by adding new subsection (b) to § 7623 and denominating the existing, discretionary awards provision as subsection (a). *See* Argument I.A, *supra*; Addendum, *infra*. The "paid from the proceeds" proviso was retained (except that the carve-out for interest was repealed) and is found in subsection (a). Nothing in the statute or the legislative history suggests that, when Congress created mandatory awards by enacting § 7623(b)

in 2006, it intended to decouple the permanent indefinite funding authority in subsection (a) from subsection (b). Nevertheless, the Tax Court once again refused to interpret the two subsections of the statute as being *in pari materia*, even though the circumstances called for it.

Instead of redefining the type of action taken by the Secretary that leads to an award, § 7623(b) expressly cross-references § 7623(a). The cross-reference enables the two provisions to be read as part of an overarching award program, under which subsection (a) "authorize[s]" awards to be paid, while subsection (b), which does not contain that word, requires those payments to be mandatory when certain requirements are met. *See* Argument I.B, *supra*. The Tax Court's crabbed reading of the statute, under which the language in subsection (a), providing that any amount payable "shall be paid from the proceeds of amounts collected . . . and any amount so collected shall be available for such payments," is not applicable to subsection (b), creates an anomaly. Congress should not be presumed to have created a scheme under which discretionary awards under subsection (a) have an assured funding source ("the proceeds of amounts collected by reason of the

information provided"), but the mandatory award program under subsection (b) does not.

Under the Tax Court's reading of the statute, the funding for mandatory awards reverts to the same state of affairs that Congress acted to overturn in the 1996 amendments: they must either be paid from general appropriated funds or be obtained by way of supplemental appropriations authority. It makes no sense to believe that, in 2006, when Congress was acting to strengthen the whistleblower program in order to create a better incentive for those with information to come forward, it would undercut the program by creating uncertainty regarding the funding of mandatory awards.

The Tax Court's unduly broad construction of "collected proceeds" under § 7623(b)(1), coupled with its refusal to require awards to be paid from "the proceeds of amounts collected," as is the case under § 7623(a), could perversely make it possible that the IRS will have insufficient collections even to pay all mandatory awards, let alone retain any of the unpaid taxes for which it pursued the action. Because the court construed the "collected proceeds" used to calculate awards to include funds collected by the IRS plus criminal fines and civil forfeitures,

mandatory awards (calculated based on that larger figure) might equal or even exceed the total amount the IRS has collected.

Here, the Tax Court's decisions require the IRS to pay Husband and Wife nearly 90 percent (nearly $18 million) of the total amount the IRS collected (approximately $20 million). (Doc. 104, JA___.) That leaves relatively little – and less than the statutory minimum of 15 percent – for any other whistleblower, including X, who might come forward and make a claim.[9] In other cases, the Tax Court's approach could mean that awards outstrip the total sum the IRS recovers. Unless there are sufficient general appropriations, the IRS will be unable to pay those whistleblowers. And the IRS itself would be left with none of the unpaid tax it sought to recover in the first place. The

[9] A new regulation, adopted with prospective effect in August 2014 and accordingly not effective here, limits the total amount of awards paid to 30 percent of the collected proceeds. Treas. Reg. § 301.7623-4(c)(4); *see* T.D. 9687, 79 Fed. Reg. 47,624 (Aug. 12, 2014). But even if the aggregate award here is limited to 30 percent under the language of § 7623(b)(1), or $22.2 million of the $74.1 million total paid by Target (and leaving a potential third whistleblower to take only what is left over after the more than $18 million already awarded by the Tax Court to Husband and Wife), that amount would still exceed IRS collections.

Tax Court's ruling therefore undermines the primary objective of the whistleblower statute: federal revenue protection.

By contrast, under the Commissioner's interpretation of § 7623, the subsections of the statute work together to authorize discretionary and, in some cases, mandatory whistleblower awards and to provide a permanent funding source for the payment of all awards. The Tax Court's holding is therefore in error.

CONCLUSION

For the foregoing reasons, the Tax Court's decisions should be reversed.

Respectfully submitted,

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Attorney for Commissioner of Internal Revenue

Dated: August 24, 2017

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I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on August 24, 2017. All participants in the case are registered users of CM/ECF and are being served by CM/ECF.

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ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C.)

Sec. 7623. Expenses of detection of underpayments and fraud, etc.

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

(1) detecting underpayments of tax, or

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

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

(b) Awards to whistleblowers.–

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