163 T.C. 141–150

# UNITED STATES TAX COURT

## REPORTS

Vol. 163 No. 4


October 1, 2024, to

October 31, 2024

UNITED STATES TAX COURT

WASHINGTON, D.C.

## JUDGES OF THE UNITED STATES TAX COURT

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KATHLEEN KERRIGAN

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Senior Judges recalled to perform judicial duties under the provisions of section 7447 of the Internal Revenue Code:

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DIANA L. LEYDEN
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ZACHARY FRIED

CHARLES G. JEANE, *Clerk*

SHEILA A. MURPHY, *Reporter of Decisions*

[1] Judge Arbeit took the oath of office on October 3, 2024.
[2] Judge Guider took the oath of office on October 3, 2024.

OCTOBER TABLE OF CASES

JOHN F. CARTER, PETITIONER *v*. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 9379-22W. Filed October 3, 2024.

R denied P's whistleblower award claim under I.R.C. § 7623. After filing a Petition in this Court for review of the denial, P filed for bankruptcy. The Internal Revenue Service filed a claim in P's bankruptcy case for unpaid tax P owed for pre-Petition year(s). P alleges that an automatic stay pursuant to 11 U.S.C. § 362(a)(8) applies to this case. *Held*: A taxpayer's bankruptcy filing does not pursuant to 11 U.S.C. § 362(a)(8) automatically stay a whistleblower case filed by the taxpayer.

*Paul Michael Spizzirri*, for petitioner.
*Caroline T. Parnass* and *James H. Brunson*, for respondent.

OPINION

GOEKE, *Judge*: In this whistleblower case petitioner seeks review of a denial of a whistleblower award by the Whistleblower Office (WBO) of the Internal Revenue Service (IRS) under section 7623.[1] After filing the Petition for review of the award denial, petitioner filed for bankruptcy. The issue before the Court is whether petitioner's bankruptcy filing automatically stays this proceeding pursuant to Bankruptcy Code section 362(a)(8).

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times. We refer to title 11 U.S.C. as the Bankruptcy Code.

*Background*

During 2012 petitioner engaged in a transaction with the target taxpayer (target). Petitioner filed a whistleblower claim in May 2015 in which he asserted that the target incorrectly reported the transaction. The WBO referred petitioner's claim to an IRS operating division for examination as part of an ongoing audit of the target involving other taxable years.

On January 24, 2022, the WBO issued a Final Determination denying a whistleblower award, stating that "[t]he information you provided didn't result in the collection of any proceeds" and "didn't result in an assessment with respect to the issues you raised."

On August 12, 2024, petitioner filed a Notice of Proceeding in Bankruptcy. Although he had filed the bankruptcy case on May 23, 2023, the parties failed to inform the Court of the bankruptcy filing promptly. The IRS has filed a proof of claim for unpaid tax for pre-Petition years. The record does not establish when or how the IRS assessed the unpaid tax. Upon filing of the Bankruptcy Notice, we ordered the parties to address whether the automatic stay under Bankruptcy Code section 362(a)(8) applies. The parties filed a joint status report indicating that petitioner believes an automatic stay applies, but respondent disagrees.[2]

Petitioner argues that the whistleblower claim concerns his tax liability because the whistleblower claim and his tax liability arise from the same transaction and involve the same operative facts.[3] Alternatively, petitioner argues that the potential for a setoff of his whistleblower award against his tax liability means that this case concerns his tax liability.

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[2] Instead, respondent asserts that the Court may wait to make a decision pending the outcome of two cases that relate to our jurisdiction to review denials of whistleblower awards, *Kennedy v. Commissioner*, No. 21-1133 (D.C. Cir. filed June 7, 2021), and *Lissack v. Commissioner*, 144 S. Ct. 2707 (2024), *vacating and remanding* 68 F.4th 1312 (D.C. Cir. 2023), *aff'g* 157 T.C. 63 (2021), that are currently before the U.S. Court of Appeals for the District of Columbia Circuit (to which all whistleblower cases are appealable pursuant to section 7482(b)(1) absent a stipulation to the contrary). Respondent previously filed a Motion to Stay Proceedings on this ground, which the Court denied.

[3] The record before the Court does not allow us to verify these assertions, but we find it unnecessary to do so.

*Discussion*

A taxpayer's bankruptcy filing generally triggers an automatic stay of Tax Court proceedings concerning a taxpayer's tax liability. *Kovitch v. Commissioner*, 128 T.C. 108, 111 (2007). In relevant part, Bankruptcy Code section 362(a)(8) stays Tax Court proceedings "concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief" under the Bankruptcy Code.[4]

A prior version of Bankruptcy Code section 362(a)(8) used the phrase "concerning the debtor" which we narrowly interpret to mean that the automatic stay "should not apply unless the Tax Court proceeding possibly would affect the tax liability of the debtor in bankruptcy." *Kovitch*, 128 T.C. at 112 (finding that in innocent spouse case, bankruptcy of the nonrequesting, intervenor-spouse does not result in an automatic stay); *see also People Place Auto Hand Carwash, LLC v. Commissioner*, 126 T.C. 359, 363 (2006) (finding that the bankruptcy filing of the members of an LLC does not automatically stay the LLC's Tax Court case); *1983 W. Rsrv. Oil & Gas Co. v. Commissioner*, 95 T.C. 51, 57 (1990) (finding that a partnership's bankruptcy filing does not automatically stay a partnership case because partnerships are not subject to tax and, thus, the case would affect the partners' tax liabilities, not the partnership's), *aff'd*, 995 F.2d 235 (9th Cir. 1993) (unpublished table decision). Congress amended Bankruptcy Code section 362(a)(8) to remove the phrase "the debtor" and replace it with the above.[5] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 709, 119 Stat. 23, 127.

We see no reason that our prior interpretation of the statute should change as a result of the amendment. The amendment clarifies what we understood, that the automatic stay applies only if the case before us concerns the tax liability of the

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[4] We have jurisdiction to determine whether this case is automatically stayed under Bankruptcy Code section 362(a)(8). *See Moody v. Commissioner*, 95 T.C. 655, 658 (1990).

[5] The amendment also separately addressed corporate debtors, which the prior version of the Bankruptcy Code did not do. The amendment provided that an automatic stay applies to a Tax Court proceeding "concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine." Bankruptcy Code § 362(a)(8).

debtor-taxpayer. *See Stanwyck v. Commissioner*, T.C. Memo. 2009-73, slip op. at 6. Both the amended version and the prior version focus on the tax liability of the debtor.

Our decision in a whistleblower case does not affect the whistleblower's tax liability even if the claim involves the same transaction and facts as his tax liability. Under section 7623(b), we have jurisdiction to review the IRS's whistleblower award determinations. We do not have jurisdiction to review or determine the target's tax liability. *Cohen v. Commissioner*, 139 T.C. 299 (2012), *aff'd*, 500 F. App'x 10 (2014); *Cooper v. Commissioner*, 136 T.C. 597, 600 (2011); *Pulcine v. Commissioner*, T.C. Memo. 2020-29. Nor do we review the IRS's decision not to proceed with an administrative action against the target or its decision not to assert that the target incorrectly reported its tax liability. *Cooper*, 136 T.C. at 600. Nor can we ask the IRS to explain its decision not to audit a target or order the IRS to audit the target. *Lacey v. Commissioner*, 153 T.C. 146, 166 (2019), *abrogated on other grounds by Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022); *Cooper*, 136 T.C. at 600–01. Rather, we review the WBO's determination to deny petitioner a whistleblower award for abuse of discretion. *Kasper v. Commissioner*, 150 T.C. 8, 21–23 (2018); *see also Van Bemmelen v. Commissioner*, 155 T.C. 64 (2020). We do not substitute our own judgment for that of the WBO.

On the basis of our jurisdiction, our decision in this whistleblower case does not involve any factual findings about the target and petitioner's transaction or its proper tax treatment. Thus, our review of the denial cannot affect the amount of petitioner's pre-Petition tax liability.

Petitioner's argument that the potential for setoff makes an automatic stay of this case appropriate is also of no avail. Bankruptcy Code section 362(a)(7) imposes an automatic stay on a creditor's setoff rights. Thus, the Bankruptcy Code stays the IRS's right to set off petitioner's whistleblower award against his tax liability that is separate from the automatic stay applicable to Tax Court cases concerning the debtor's tax liability. The automatic stay against a creditor's right of setoff "does not defeat the right of setoff; rather, setoff is merely stayed pending an 'orderly examination of the debtor's and creditor's rights.'" *United States v. Orlinski* (*In re Orlinski*), 140 B.R. 600, 603 (Bankr. S.D. Ga. 1991) (quoting 4 *Collier*

*on Bankruptcy* ¶ 553.05 (15th ed. 1991)). Before the IRS can exercise any right to set off a whistleblower award against petitioner's unpaid tax liability, the IRS must obtain relief from stay from the bankruptcy court. *See In re Dominguez*, 67 B.R. 526, 528 (Bankr. N.D. Ohio 1986). Accordingly, there is no need for the bankruptcy filing to prevent this Court from determining whether petitioner is in fact entitled to a whistleblower award.

To reflect the foregoing,

*An appropriate order will be issued.*

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STEPHEN C. JENNER AND JUDY A. JENNER, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 8903-23. Filed October 22, 2024.

R assessed Foreign Bank Account Reporting (FBAR) penalties against Ps. Treasury's Bureau of the Fiscal Service informed Ps that funds would be withheld from their monthly Social Security benefits to satisfy their debts. Ps requested a collection due process (CDP) hearing. R denied Ps' request for a CDP hearing because the FBAR penalties assessed against them were not taxes and not subject to the requirements of I.R.C. § 6330. Ps filed a Petition contending that R deprived them of their CDP rights. R moved to dismiss the case for lack of jurisdiction. *Held*: FBAR penalties are not taxes imposed by the Internal Revenue Code and thus are not subject to the requirements of I.R.C. §§ 6320 and 6330. *Held, further*, this Court lacks jurisdiction.

*Steven Ray Mather*, for petitioners.

*Tiffany A. Loewenstein*, *Gabriel H. Kim*, and *Michael K. Park*, for respondent.

OPINION

FOLEY, *Judge*: The sole issue for decision is whether Foreign Bank Account Reporting (FBAR) penalties are subject to the requirements of sections 6320 and 6330.[1]

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[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and regulation

*Background*

Petitioners, Stephen C. Jenner and Judy A. Jenner, were assessed FBAR penalties pursuant to 31 U.S.C. § 5321 relating to 2005 through 2009 for an alleged failure to timely file foreign bank account reports. In a letter dated November 9, 2022, the Department of the Treasury's (Treasury) Bureau of the Fiscal Service (BFS) informed petitioner Judy Jenner that the Treasury Offset Program (TOP) would withhold funds from her monthly Social Security benefits. In a nearly identical letter dated November 16, 2022, BFS informed petitioner Stephen Jenner that TOP would also withhold funds from his Social Security benefits. These letters directed petitioners to contact BFS's Debt Management Servicing Center (DMSC) to prevent the collection activity.

Petitioners each requested collection due process (CDP) hearings relating to the FBAR penalties assessed against them by submitting, to DMSC, identical Forms 12153, Request for a Collection Due Process or Equivalent Hearing, dated December 7, 2022. Subsequently, in a letter dated April 6, 2023, petitioners asked the Internal Revenue Service's (IRS) BSA/CTR Operations Center whether it had received petitioners' CDP requests. The IRS, in a letter dated May 11, 2023, notified petitioners that they did not qualify for a CDP hearing because the FBAR penalties assessed against them were not taxes and not subject to the requirements of section 6330.

On June 5, 2023, petitioners, while residing in Florida, filed their Petition alleging that they were denied their CDP rights pursuant to section 6330. On July 19, 2023, respondent filed a Motion to Dismiss for Lack of Jurisdiction and contended that the collection of FBAR penalties is not subject to the notice and other requirements of section 6330.

*Discussion*

The FBAR penalties at issue are authorized and imposed by Title 31, Money and Finance, of the United States Code. *See generally* 31 U.S.C. § 5311. Title 31 U.S.C. § 5314(a) provides that each U.S. person must "keep records, file reports, or

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references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times.

keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency." Accordingly, any person that meets the above definition must file Financial Crimes Enforcement Network (FinCEN) Form 114, Report of Foreign Bank and Financial Accounts (FBAR), with FinCEN on or before June 30 of the year following the calendar year for which the financial account is maintained. *See, e.g.*, 31 C.F.R. §§ 1010.350(a), 1010.306(c) (2023). The Secretary of the Treasury (Secretary) may impose a civil penalty on any person who fails to file the requisite form. 31 U.S.C. § 5321(a)(5)(A).

The Secretary has delegated to FinCEN the authority to enforce the provisions and impose civil penalties for violations of 31 U.S.C. § 5314. *See* 31 C.F.R. § 1010.810(d) (2023). FinCEN subsequently redelegated this authority to the IRS. *See* 31 C.F.R. § 1010.810(g); *see also* Delegation Order 25-13, Internal Revenue Manual 1.2.2.15.13 (Mar. 8, 2022). Notwithstanding this redelegation, Title 31 and its accompanying regulations govern how FBAR penalties are assessed and collected. Title 31 U.S.C. § 5321(b)(1) grants the Secretary the authority to assess FBAR penalties. Upon assessment, FBAR penalties become a nontax debt to the United States, and, once that debt has been delinquent for more than 180 days, the Secretary may refer the debt to an executive agency to take appropriate collection action. *See* 31 U.S.C. § 3711(g)(1), (4); *see also* 31 U.S.C. § 3701(a)(8) (providing that a nontax debt is any debt or claim other than a debt or claim pursuant to the Internal Revenue Code). Title 31 U.S.C. § 3716 grants executive agencies the authority to collect outstanding debts through administrative offsets and provides the notice and other requirements that must be followed prior to collection. *See also* 31 U.S.C. § 3701(d)(1) (providing that 31 U.S.C. § 3716 does not apply to a claim or debt pursuant to the Internal Revenue Code). Title 31 U.S.C. § 5321(b)(2) provides that the Secretary may commence a civil action to recover FBAR penalties. *See* 31 C.F.R. § 5.16(b) (2023) (providing that Treasury may refer delinquent debts to the Department of Justice for litigation).

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent authorized by Congress. *See* § 7442; *see also Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). Section 6330(d)(1) provides that a taxpayer

"may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." This Court has consistently held that jurisdiction pursuant to section 6330(d)(1) is contingent on the issuance of a valid notice of determination. *Goza v. Commissioner*, 114 T.C. 176, 182 (2000). The Court has further explained that "a taxpayer may only file a petition for review with this Court where the administrative determination concerns a tax over which the Court generally has jurisdiction." *Id.*; *see also Lunsford v. Commissioner*, 117 T.C. 159, 164 (2001).

Petitioners contend that the letter they received from the IRS notifying them that they did not qualify for a CDP hearing provided the requisite determination pursuant to section 6330(d)(1) to invoke this Court's jurisdiction; "nothing in I.R.C. § 6330 limits the CDP procedures to Title 26 liabilities;" the administrative offsets on their Social Security benefits are "levies by the Secretary" that entitled them to a CDP hearing; and there is no "rational distinction" between levies by the Secretary to collect Title 26 liabilities and levies to collect FBAR penalties. They conclude that "the CDP procedures in I.R.C. § 6330 apply to any type of liability . . . to the extent the Secretary files a lien or intends to levy."

These contentions are specious.

A necessary component of any determination made pursuant to section 6330 is that it relate to an unpaid tax. *See* § 6320(a)(3)(A) ("The notice required under paragraph (1) shall include in simple and nontechnical terms . . . *the amount of unpaid tax* . . . ." (Emphasis added.)); *see also* § 6330(a)(1) ("Such notice shall be required only once for the taxable period to which *the unpaid tax specified* in paragraph (3)(A) relates." (Emphasis added.)). We have previously explained that the tax making up the underlying liability is the amount "a taxpayer owes pursuant to the tax laws that are the subject of the Commissioner's collection activities." *Mason v. Commissioner*, 132 T.C. 301, 316 (2009) (quoting *Callahan v. Commissioner*, 130 T.C. 44, 49 (2008)). "The statutes creating the 'collection due process' procedures, and the statutes creating the lien and levy collection mechanisms reviewed by those procedures, all explicitly pertain to 'tax' . . . ." *See Williams v. Commissioner*, 131 T.C. 54, 59 (2008)

(holding that FBAR penalties are not subject to the deficiency procedures because no notice of deficiency is authorized or required prior to assessment pursuant to sections 6212 and 6213).

FBAR penalties are not imposed by the Internal Revenue Code, and, as a result, they are not "taxes." Section 6201(a) provides:

> The Secretary is authorized and required to make the inquiries, determinations, and assessments of *all taxes* (including interest, additional amounts, additions to the tax, and assessable penalties) imposed *by this title* [i.e., Title 26, the Internal Revenue Code] . . . .

(Emphasis added.) Because FBAR penalties are not imposed pursuant to Title 26, they "are not subject to the various statutory cross-references that equate 'penalties' with 'taxes.'" *Mendu v. United States*, 153 Fed. Cl. 357, 365 (2021) (holding that FBAR penalties are not subject to the *Flora v. United States*, 362 U.S. 145 (1960), full-payment rule because they are not taxes); *see, e.g.*, §§ 6665(a)(2), 6671(a). In addition, nothing in 31 U.S.C. § 5321(a) provides that an FBAR penalty is deemed a tax or that it is required to be assessed or collected "in the same manner as a tax." *See* §§ 6665(a)(1), 6671(a).

Because an FBAR penalty is not a tax, neither section 6321 nor section 6331 applies to petitioners, and therefore, no lien or levy to collect these penalties is authorized. Section 6320(a)(1) provides that "[t]he Secretary shall notify in writing the person described in section 6321." The person described in section 6321 is any person "liable to pay any tax" who "neglects or refuses to pay the same after demand." Section 6330(a)(1) provides that "[n]o levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing." "The person described in section 6330(a)(1) is the same person described in section 6331(a)—i.e., the person liable to pay the tax due after notice and demand who refuses or neglects to pay (referred to here as the taxpayer)." Treas. Reg. § 301.6330-1(a)(3), Q&A-A1. "The collection mechanism authorized in the FBAR statute itself is not lien or levy but 'a civil action to recover a civil penalty.'" *Williams*, 131 T.C. at 59 n.6 (quoting 31 U.S.C. § 5321(b)(2)).

In short, Title 31 expressly provides the assessment and collection procedures for FBAR penalties, and there is no statutory, regulatory, or judicial authority providing that these

penalties are subject to sections 6320 and 6330. "[T]he rights afforded by the CDP statutes apply only to those people subject to IRS actions to collect 'tax.'" *Ryckman v. Commissioner*, 163 T.C. 46, 55 (2024). FBAR penalties are not taxes. Accordingly, the IRS was under no obligation to provide petitioners with a CDP hearing.

To reflect the foregoing,

*An order of dismissal for lack of jurisdiction will be entered.*