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UNITED STATES TAX COURT

Whistleblower 21276-13W, et. al., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket Nos. 21276-13W 21277-13W

Petitioners' Reply to Respondent's Motion for Reconsideration

Pursuant to the Court's Order dated September 8, 2016, Petitioners submit this Reply to Respondent's September 2, 2016 Motion for Reconsideration.

Respondent asks the Court to reconsider its holdings on two distinct issues: (1) "the Court's interpretation of collected proceeds," and (2)"the Court's collected proceeds are to be used only for purposes of calculating the amount of the award [to be given to the whistleblower]." (Mot. for Reconsideration ("Mot.") at 1.)

The grounds, ostensibly, for respondent's motion is the Court's opinion in *Whistleblower 22716–13W v. Commissioner*, 146 T.C. No. 6 (2016). But although Respondent asserts that he "is not seeking to rehash legal arguments previously made, or raise arguments that could have been made in the prior proceedings," that is precisely what he has done in his motion for reconsideration.

The Court should deny Respondent's motion in its entirety because it fails to raise new arguments, or arguments that could not have been made previously, and is therefore an inappropriate attempt to reargue and prolong proceedings that have already concluded. It has now been over three years since Petitioners sought review

of Respondent's denial. Enough is enough—the interest in finality of this litigation outweighs any benefit from considering Respondent's improper attempt to reargue the issues this Court has already decided.

Nonetheless, even if the Court decides to consider them, Respondent's contentions are completely without merit, and on this separate ground the motion should also be denied in its entirety. Respondent again urges the Court to selectively ignore the statute's plain and unambiguous language. In urging the Court to limit whistleblower awards to title 26, and in arguing that the Court's opinion conflicts with the statutory structure of section 7623, Respondent would have the Court ignore the terms "collected proceeds" and "including", and instead substitute the term "title 26 amount." And in complaining that section 7623(b)(1) has no appropriation or authorizing language, Respondent asks the Court to ignore section 7623(b)(1) mandate that "individual shall [...] receive" an award.

Respondent's Motion Should be Denied As Improper

Respondent asserts that "[t]he parties' previous briefings demonstrate that both parties interpret the statute to require that any award paid pursuant to section 7623(b) must be paid from the proceeds of amounts collected," (Mot. ¶ 5), and that, because the Court disagreed with this position, reconsideration is warranted.

First, Respondent misconstrues Petitioners' briefings, in which Petitioners put forward the interpretation adopted by the Court, as well as several arguments in the alternative. In particular, Petitioners' argued that "availability" of funds was "simply not an issue" because "section 7623 provides the requisite appropriation or

statutory authority for payment of a portion thereof as a whistleblower award." (Pet'rs' Br. on Collected Proceeds 35.) Petitioners also argued that, pursuant to section 7623(b)(1)

> the whistleblower's award is determined by: (1) determining the amount of 'collected proceeds'; (2) determining the applicable award percentage; and (3) *multiplying the award percentage by the amount of collected proceeds to determine the amount of the whistleblower award.*

(Pet'rs' Response to Resp't's Mem. on Collected Proceeds 47–48 (emph. added).) Moreover, this Court has previously noted that, pursuant to section 7623(b)(1), a whistleblower "shall receive an award *equal to* a percentage of the collected proceeds" *Cohen v. Commissioner*, 139 T.C. 299, 302 (2012) (emph. added).

Second, the mere fact that the Court disagreed with a position of the parties is not a proper ground for reconsideration. In deciding an issue of statutory interpretation, the Court looks to and interprets unambiguous statutory language itself. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). It is not limited, as Respondent suggests, to picking from the interpretations presented by the parties in their briefs.

Respondent further claims that *Whistleblower 22716–13W* "interprets the term 'amounts in dispute' [in section 7623(b)(5)] in a manner inconsistent with this opinion." (Mot. ¶ 5.) Setting aside the fact that Respondent presents no compelling reason why the Court's interpretation of section 7623(b)(5) conflicts with its holding on "collected proceeds," the Court's opinion *explicitly recognized* and preemptively

dealt with Respondent's contentions. Indeed, in its opinion the Court explained at length why its "holding in this matter is not in conflict with [its] holding in *Whistleblower 22716-13W v. Commissioner*." (Slip op. 21.) Moreover, Respondent ignores the fact that *Whistleblower 22716-13W* explicitly set aside the question of whether FBAR—and effectively other non-title 26 provisions—were encompassed by 7623(b)(1). *See Whistleblower 22716-13W*, 146 T.C. No. 6 at 22. The Court in *Whistleblower 22716-13W* not only did not suggest that section 7623(b)(1) was as narrow as section 7623(b)(5), but specifically recognized the significant difference in the two provisions' language, and invited exactly the Court's holding here that the scope of section 7623(b)(1), with its "broad and sweeping" use of "collected proceeds" and "including," is far broader than that of section 7623(b)(5). (Slip op. at 32.)

Furthermore, Respondent had ample opportunity to raise arguments related to section 7623(b)(5)'s threshold requirement prior to the Court's opinion. Respondent was a party to *Whistleblower 22716-13W*, and therefore was aware—at the time of the parties' briefing in this case—of the arguments it belatedly makes now. Moreover, as Respondent notes, Petitioners filed a Notice of Supplemental Authority which dealt with the *Whistleblower 22716-13W* opinion on March 25, 2016—11 days after the opinion was released. Respondent had ample opportunity to respond to petitioners" notice, file its own notice, or otherwise seek to supplement its briefing. That Respondent instead sat idly by for several months was Respondent's own choice, and he cannot now claim that there was no opportunity as the basis for moving the Court to reconsider its opinion.

Last, while Respondent attempts dress up and disguise his rehashing of his longstanding[1] position on "collected proceeds" by invoking the Court's decision in *Whistleblower 22716–13W*, much of Respondent's motion deals with his position on the "availability" of funds. (Mot. ¶¶ 14–26). Yet there is no connection between the *Whistleblower 22716–13W* opinion and the "availability" issue—nor does Respondent even attempt to make one. All of respondents contentions with respect to "availability" could have been made—and, in large part, *were* made—in Respondent's briefing. Simply put, with respect to "availability," nothing has changed since the parties briefed the court. Respondent motion is merely an inappropriate attempt to re-raise "availability" arguments under the pretense that *Whistleblower 22716–13W* has made them relevant.

Respondent's Arguments are Meritless

Respondent makes a number of arguments—none of which are new or could not have been made prior to the Court's opinion—urging the Court to reconsider its holdings regarding "collected proceeds" and on the "availability" of funds used to pay awards. As to availability—both the statute and the Court's opinion are clear: section 7623(b)(1) establishes a mandatory entitlement, and no further appropriation or authorizing language is needed. Respondent urges the Court to

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[1] Although Respondent has held this position throughout this litigation, Respondent—as explained in Petitioners' briefing—has historically administered his whistleblower program in a manner compatible with the Court's Opinion. *See also Whistleblower 22716-13W*, 146 T.C. at 21 ("Indeed, the record in this case indicates that the [Whistleblower] Office, prior to 2009, did pay discretionary awards under section 7623(a) based on [title 31] FBAR recoveries, and nothing in this Opinion would prevent the Secretary from doing so in the future.")

selectively apply language from subsection (a) to subsection (b), but ignores language in subsection (a) that would clearly foreclose respondent's interpretation. Respondent also urges that the Court's holding creates a conflict between sections 7623(b)(1) and (b)(5), but fails to provide a reason why, beyond arguments the Court has already considered and rejected. Lastly, Respondent complains that the Court's opinion could produce an "anomalous" result in a future case. In doing so, however, Respondent has ignored the anomalous result in *this* case that would result from its own position—i.e., clearly and solely tax-related proceeds not qualifying for the calculation of a mandatory whistleblower award—and has instead concocted a hypothetical so far-fetched as to be absurd.

Section 7623(b)(1) Creates a Mandatory Entitlement, and Does Not Require Any Additional Appropriating or Authorizing Law

Respondent argues that the term "collected proceeds" was used only "to link the funding source for the payment of awards to the authorizing language already found at section 7623(a)—'proceeds of amounts collected.'" But petitioners have argued, and as the Court has held, section 7623(b) is self-appropriating, and serves as its own authorizing language. That is, the fact that Congress provided that a whistleblower "*shall* [...] *receive* as an award at least 15 percent but not more than 30 percent of the collected proceeds" creates, in effect, an entitlement to a whistleblower award that does not depend on appropriated funds. Indeed, the 1996 amendment to section 7623(a) was necessary precisely because whistleblower awards under subsection(a) are discretionary. As Respondent himself points out, they were paid from appropriated funds, which sometimes ran out. (Mot. ¶ 22.)

After the 1996 amendment, the "proceeds of amounts collected" served as the source of funds for the discretionary award program, thereby eliminating the need for Congress to continually appropriate funds for this purpose. More specifically, the 1996 amendment provided the discretionary program with a permanent indefinite appropriation that is open-ended as to both period of availability and amount.[2]

As the Court succinctly put it, the mandatory award program of "[s]ection 7623(b) is different." (Slip op. 25.) Because the statute requires that an award be paid under certain conditions, no appropriation is necessary. In particular, the use of the term "shall" is widely recognized as creating a mandatory entitlement for an individual.[3] Congress's use of "shall" also has important consequences with respect to the need for appropriations. Under the Budget Enforcement Act, the term "entitlement authority" means "[t]he authority to make payments [...] the budget authority for which is not provided for in advance by appropriation Acts [...] *if under the provisions of the law containing that authority, the United States is obligated to make such payments* to persons [...] who meet the requirements

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2 "An indefinite appropriation may appropriate all or part of the receipts from certain sources [...]." *See* United States Government Accountability Office, *Principles of Federal Appropriation Law Vol. I* at 2–15 (3d Ed., 2004) ("indefinite appropriation").

3 The Supreme Court, for example, unanimously refers to "the mandatory word 'shall.'" *See Sebelius v Auburn Regional Med. Ctr.*, 133 St. 817, 824 (2013); *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531 (2007) ("Section 402(a) of the CWA provides, without qualification, that the EPA 'shall approve' a transfer application unless it determines that . . . . By its terms, the statutory language is mandatory . . . ").

established by that law." 2 U.S.C. § 622(9)(A). This reflects the fact that, although Congress is required to appropriate funds for much of the Government's discretionary spending, where the law creates a mandatory entitlement, such as section 7623(b) does, no appropriation is necessary.[4]

The Court correctly concluded that the 7623(a) language creating an indefinite permanent appropriations language was unrelated to 7623(b), which by its own terms creates a mandatory entitlement, obviating the need for appropriation. Although Respondent insists there must be "decoupling" language, (Mot. ¶ 23), there is no need for it—as the Court recognized, decoupling is accomplished with the creation of a mandatory entitlement award program. (*See* slip op. 28 ("Section 7623(b)(1) does not refer to, or require, the availability of funds to be used in making an award. . . . The statute explicitly instructs the Secretary to pay the whistleblower who qualifies for the mandatory award program . . . . ").)

Contrary to Respondent's assertion, the Court's decision does not lead to the "peculiar consequence" that the discretionary program has an assured funding and the mandatory award program does not. (Mot. ¶ 24.) Respondent fundamentally misunderstands the source of funding for the whistleblower awards—namely, that because section 7623(b) creates a mandatory entitlement, the Government is bound to pay the award. And, as described above, the very fact that the mandatory

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[4] Although some entitlements, such as Medicaid, are funded through appropriation acts "because the entitlement is created by operation of law, if Congress does not appropriate the money necessary to fund the payments, *eligible recipients may have legal recourse*." United States Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process* 13 ("Appropriated Entitlement") (emph. added).

program creates an entitlement provides an even stronger source of funding for section 7623(b).

Further, contrary to the assertion in Paragraph 26 of the Motion for Reconsideration, the Court's opinion does address how whistleblower awards under Section 7623(b) are to be funded, namely through an entitlement: "The statute explicitly instructs the Secretary to pay the whistleblower [...]." (Slip op. 29.) Respondent just does not like the answer. It is telling that even Respondent cites nothing in support of his contention that the Court's opinion creates a barrier to paying whistleblowers, stating merely that the Court's opinion "creates uncertainty."[5] (Mot. ¶ 25.) There is no uncertainty—the language of section 7623(b) plainly requires the Government to pay a whistleblower award where certain conditions are met, as they are in this case, and the Court's opinion was a model of clarity on this point.

The Court's Opinion Correctly Distinguishes Between Section 7623(a) and Section 7623(b)

By its own plain language, section 7623(b) refers only to subsection (a) in one, narrow respect—to define the scope of "administrative or judicial action" covered by the mandatory award program. In particular, section 7623(b)(1) applies "[i]f the Secretary proceeds with <u>any administrative or judicial action described in subsection (a)</u> based on information brought to the Secretary's attention by an individual." (emph. added).

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[5] Further, Respondent incorrectly cites as part of that uncertainty "absent express statutory authority"—however, there *is* express statutory authority: Section 7623(b) itself.

Of the text of subsection (a), only two clauses describe administrative or judicial actions:

> 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.

(emph. added). Respondent, however, would have the court apply more of subsection (a) to subsection (b), including the limitation that an award is authorized only "in cases where such expenses are not otherwise provided for by law" and the appropriations language added by the 1996 amendments. Respondent, that is, still "desires the Court to impose some, but not all, of the rules of the discretionary whistleblower award program of section 7623(a) on the mandatory whistleblower award program of section 7623(b)." (Slip op. 29.) In particular, Respondent ignores the following portions of subsection (a):

> 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.

(emph. added). That is, Respondent ignores the fact that the "not otherwise provided for by law" limitation clearly modifies awards that the Secretary "deems necessary"—that is, *discretionary* awards, not the mandatory awards provided by section 7623(b). Similarly, Respondent ignores the fact that the "authorizing language" of section 7623(a) by its own terms only applies to "amount[s] payable under the preceding sentence." The preceding sentence, again, includes the "as he deems necessary" language, definitively establishing that section 7623(a)'s second sentence applies only to discretionary award, not to the awards mandated under section 7623(b).

It is not the case, as Respondent claims, that the Court's opinion causes "the provisions of (a) and (b) to operate without reference to each other." (Mot. ¶ 15.) The Court's holding recognizes that section 7623(b)(1) refers to the categories of administrative and judicial actions described in section 7623(a). Respondent's wish that some other parts of subsection (a) also applied to subsection (b) is, however, flatly foreclosed by the statute's plain language. To paraphrase Respondent, if Congress had intended the provisions of (a) and (b) to operate differently in some respects, it would have enacted a separate subsection. And, indeed, that is just what Congress did when it enacted the 2006 amendments.[6]

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[6] Respondent expends a great deal of words to make the point that Section 7623(a) and 7623(b) should operate as a "coherent statutory scheme." (Mot. 8–10.) However, the Court's opinion does provide a coherent statutory scheme with its ruling – and with a recognition that Section 7623(a) and (b) represent two distinct

The Court's Holding on "Collected Proceeds" is in Harmony with the Statute as a Whole

Respondent claims that "the Court's opinion cannot be reconciled with the fact that Congress explicitly limited mandatory award to those actions involving tax, penalties, interest, additions to tax and additional amounts." (Mot. ¶ 12.) Yet Respondent fails to convincingly explain why Congress used the term "collected proceeds," as well as the term "including." Moreover, Respondent fails to consider that the 7623(b)(5) threshold is a means—along with section 7623(b)(1)'s reference to section 7623(a)'s definition of "action"—by which Congress rooted the IRS whistleblower program in tax, broadly defined.

Once the Government takes an action "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," based on a whistleblower's information, a whistleblower is entitled to an award if there is more than $2 million of tax and penalties "in dispute." As the Court has held, the whistleblower's award is calculated based on all the proceeds collected by the Government from the actions—and "any related actions"—regardless of whether they are a title 26 tax or

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programs to award whistleblowers – one discretionary and the other mandatory (which inherently have two different sources of funding). Respondent's thin argument is not anchored in the reality of the tax code -- where it is common to have both shared and separate rules in one code section. For example, Section 41 – the Research and Development (R&D) tax credit has a basic research credit – Section 41(a)(1); an Alternative Incremental Credit – 41(c)(4); the Alternative Simplified Credit – 41(c)(5); a separate credit for Qualified Research Organizations – 41(e); and a new refundable credit for small businesses – 41(h). Just as with section 7623, Congress put similar—but significantly different—provisions in the same section of the Internal Revenue Code.

not. This construction effects Congress's intent to award tax whistleblowers fully for their contribution, and prevents the anomalous result of denying or reducing awards to whistleblowers who provide information on tax-related conduct egregious enough to rise to the criminal level, or where the Government, in its discretion, resolves a matter by seeking non-title 26 remedies.

The Court's Holding on "Collected Proceeds" Does Not Create Anomalous Results.

Respondent's most bizarre argument is his feigned concern that an action resulting in a large amount "of dollars being collected that do not constitute tax, penalties, interest, additions to tax and additions to tax and additional amounts will not result in any award under section 7623(b), while an action resulting in the exact same amount of collections, plus a comparatively insignificant $2 million in tax, will result in an 'expansive' award encompassing not only the $2 million in tax, but also the other amounts collected." (Mot. ¶ 12.)

The Respondent's answer is, of course, that to avoid this "anomaly" the whistleblower should be denied the full award in both cases. And, as the Court is well aware, Respondent's position throughout this litigation, has been that amounts collected through non-title 26 provisions–even where clearly tax-related, as in this case—do not qualify under either (b)(1) or (b)(5). Under Respondent's theory, therefore, there would be many instances where a whistleblower provides information on criminal tax conduct, and where that information results in substantial non-title 26 fines, forfeitures, and other collected proceeds, but where no award at all is given. Respondent's theory—not the Court's holding—would create

this truly anomalous result. And, as Petitioners have argued, it could not be what Congress intended when it used the broad terms "collected proceeds" and "including" to create an expansive mandatory award program to encourage whistleblowers to come forward with valuable insider information.

Petitioners also note that the significance of Congress's use in section 7623(b)(5) of the term "in dispute," rather than "collected" or a similar term was not addressed in *Whistleblower 22716–13W*, and has not been squarely addressed by any decision of this Court. In *Lippolis*, the Court recognized that the key phrase of section7623(b)(5) is: "if the tax, penalties, interest, additions to tax, and additional *amounts in dispute* exceed $2,000,000." *Lippolis v. Commissioner*, 143 T.C. 393 (2014) (emph. added). The Court noted that while the meaning of "amounts in dispute" was not directly at issue, the question for the Court was whether the amount in dispute in regards to any administrative or judicial action initiated against the target as a result of the whistleblower claim exceeds $2 million. *See id.* at 400. *Lippolis* also notes that Respondent's regulations now define the amount "in dispute" as either the amount actually collected, "or the maximum total of such amounts that were stated in formal positions taken by the IRS in the action(s)." *Id.* at 399 n. 6 (citing 26 C.F.R. § 301.7623-2(e)(2)).

The threshold requirement of section 7623(b)(5) is therefore far broader than characterized by Respondent—it is not at the end of the day what is settled with the taxpayer that determines the amount "in dispute", but rather the maximum amount of any administrative or judicial action or position taken by the government at any

time. That is, if the Government begins the action by seeking $3 million, but eventually settles for $1 million, the threshold argument is met because over $2 million was disputed, even though only $1 million was eventually collected.[7] It is almost inconceivable that a judicial or administrative action 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," (26 U.S.C. § 7623(a)), could result in "hundreds of millions or even billions of dollars being collected," (Mot. ¶ 12), all without at least $2 million in "tax, penalties, interest, additions to tax, and additional amounts" ever being "in dispute," (26 U.S.C. § 7623(b)(5)).

Lastly, even under Respondent's hypothetical, there is nothing that bars the Respondent from issuing a discretionary award under 7623(a) to the hypothetical whistleblowers who, for whatever reason do not meet the $2 million. In fact, the Court's decision will go far in making that possible since it addresses the great problem of the IRS's narrow and recent definition of "collected proceeds." It bears repeating that historically the IRS did pay awards pursuant to section 7623(a) for non-title 26 collections.[8] The current IRM—to the Service's credit—already applies many of the same standards of mandatory awards to discretionary awards. *See*

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7 Similarly, the threshold is also met if (1) a taxpayer is assessed over $2 million in title 26 taxes, but where the action is ultimately settled pursuant to a non-title 26 provision, such that the taxpayer ultimately pays less than $2 million in title 26 tax; (2) a taxpayer is assessed over $2 million, but due to bankruptcy, appeal, or other reason pays less than $2 million.

8 *See, supra*, note 1 and accompanying text.

generally, IRM 25.2.2.7.4. Given the Court's ruling, the door is wide open for the IRS to reverse its new position and return to its long-held practice and provide awards to whistleblowers who provide valuable information but do not meet the section 7623(b)(5) threshold.[9]

Conclusion

Respondent has raised nothing in its motion that should disturb the Court's reasoned and clear opinion, and has inappropriately used Rule 161 to re-hash old arguments and further delay a final judgment in this matter.

As the Court has already recognized, the mandatory award program established by section 7623(b) differs in important ways from section 7623(a)'s discretionary award authorization. Subsection (a) requires appropriation or other authorization for the disbursement of funds. By contrast, subsection (b) is a mandatory entitlement that requires no appropriation.

As the Court has also recognized, there is nothing about the Court's opinion that conflicts with that in *Whistleblower 22716-13W*, and no reason—given the significantly different language Congress used—that section 7623(b)(5)'s threshold requirement cannot be narrower than the "collected proceeds" used in calculating an award under section 7623(b)(1). Congress intended to award whistleblowers a percentage of the collected proceeds from any administrative or judicial action for

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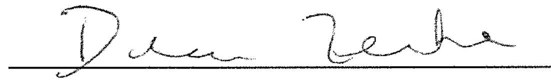
[9] Not only can the IRS issue a discretionary award, but "[t]he IRS has broad discretion in deciding whether to pursue a taxpayer identified by a whistleblower and in determining how such cases shall be resolved." *Whistleblower 22716-13W*, 146 T.C. at 26. Respondent has the discretion necessary to ensure that, in a case of "hundreds of millions or even billions" of collected proceeds, the 7623(b)(5) threshold is met, and that the whistleblower is covered by 7623(b).

detecting underpayments of tax, or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. Congress ensured a nexus to tax by specifying that the Government's action must be broadly tax-related, and, for a mandatory award to apply, the amount of tax, penalties, interest, additions to tax, and additional amounts in dispute must exceed $2 million.

The Court is correct that Congress did not intend that whistleblower awards calculated solely from proceeds collected under title 26 provisions, and correctly held that "[t]he term 'collected proceeds' means all proceeds collected by the Government from the taxpayer [and] is not limited to amounts assessed and collected under title 26," (slip op. at 32) and that section 7623(b)(1) instructs the Secretary to pay an award that is calculated as a percentage of the collected proceeds, (slip op at 26).

Respondent's motion should therefore be denied in its entirety.

Respectfully submitted,



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Dated: September 13, 2016

Certificate of Service

This is to certify that on September 13, 2016, a copy of the foregoing Reply to Respondent's Motion for Reconsideration was served upon counsel for Respondent, by mailing the same in postage-paid envelope to the following counsel of record:

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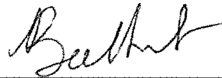

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