UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOSEPH A. INSINGA,	)	
	)	**CZ**
Petitioner,	)	
	)	
v.	)	Docket No. 16575-16W.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This is a "whistleblower" case filed pursuant to I.R.C. section 7623(b). In his petition, Joseph A. Insinga sought an award for having given to the Internal Revenue Service ("IRS") information leading to the collection of tax from a "target" taxpayer referred to as "AmSub" (a pseudonym). But on July 16, 2018, Mr. Insinga filed a motion (Doc. 20) to dismiss his own petition. On July 19, 2018, the Commissioner filed a response (Doc. 23) objecting to the motion. We think that there is less to this dispute than meets the eye, and we will order further filings by the parties to determine whether that is so.

Background

The "Final Determination" that the IRS's Whistleblower Office ("WBO") issued to Mr. Insinga regarding his AmSub claim (Doc. 1, petition Exhibit 1) is dated "July 18, 2106"-- a date almost 80 years in the future. Neither party mentions this fact; but Mr. Insinga's petition (at ¶ 2) implicitly admits that is a transposition of 2016; and the Commissioner likewise asserts that the date of the final determination is July 18, 2016; so we take that date as a given. (If either party attaches any significance or effect to the erroneous year date, it should so state in the filing it makes in response to this order.) Mr. Insinga timely filed his petition in this Court on July 26, 2016.

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Almost two years later, on July 16, 2018, Mr. Insinga filed a motion to dismiss (Doc. 20), asking to be allowed "to withdraw and voluntarily dismiss his petition herein and this appeal".

The Commissioner filed a response (Doc. 23), which states:

> 2. Petitioner provided respondent a copy of the motion on July 13, 2018. After reviewing the motion, respondent requested that petitioner confirm he understood that "withdrawal of his appeal results in dismissal with prejudice and, consistent with Jacobson [v. Commissioner, 148 T.C. 68 (2017)], dismissal will 'leave binding on petitioner the IRS's July 18, 2016 determination to deny his claim for an award.'"
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> 3. Petitioner responded "No, I do not. The whole point is to withdraw the claim without prejudice . . . ."
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> 4. Accordingly, respondent objects to petitioner's motion to the extent that it seeks dismissal without prejudice ....

Discussion

The Tax Court's rules do not specify whether a dismissal of a whistleblower petition by the petitioner or by the Court at the petitioner's request should be with or without prejudice. In such an instance where we have no rule, we "giv[e] particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand." Rule 1(b). Fed. R. Civ. P. 41(a)(1) and (2) provide that such dismissals are generally "without prejudice", but we now must consider whether that generality is "suitably adaptable" here.

Dismissal in a deficiency case

The majority of the cases filed in the Tax Court are so-called "deficiency cases" brought pursuant to section 6213. By filing such a case, the taxpayer in effect suspends the process by which the IRS would assess and collect tax that it believes the taxpayer owes. Tax administration might be impeded or distorted if a taxpayer, having thus halted the tax collector's operations, could thereafter dismiss his own case "without prejudice"--i.e., without any adjudication of his tax liability and without any prejudice to his right to challenge the IRS's determination of that liability. To mitigate that possibility, section 7459(d) provides that "a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the

deficiency is the amount determined by the Secretary". Consequently, we held in Estate of Ming v. Commissioner, 62 T.C. 519, 522-523 (1974), that a taxpayer may not withdraw his petition in a deficiency case brought pursuant to section 6213 in order to avoid the entry of a decision. Rather, a decision will be entered when a duly filed deficiency case is dismissed. By statute, such a dismissal is thus with prejudice to further litigation of that liability.

Dismissal in a whistleblower case

However, we have held that it may be otherwise in a whistleblower case under section 7623(b). The parties here acknowledge our opinion in Jacobson v. Commissioner, 148 T.C. 68 (2017), a case in which we held that a whistleblower petitioner can voluntarily dismiss his petition. In Jacobson we distinguished Estate of Ming and likened the whistleblower petition instead to a "collection due process" petition, as in Wagner v. Commissioner, 118 T.C. 330 (2002), and to a "stand alone" petition under section 6015(e)(1) for "innocent spouse" relief, as in Davidson v. Commissioner, 144 T.C. 273 (2015). In Jacobson we held, 148 T.C. at 70-71:

> Section 7459(d), requiring entry of a decision in deficiency cases, likewise does not apply here [in a whistleblower case]. Section 7623(b)(4), which grants this Court exclusive jurisdiction to review IRS determinations regarding whistleblower awards, provides that any appeal must be filed "within 30 days of such determination." Because the Office's final determination on her claim was made 19 months ago, petitioner has no right to file another petition in our Court for review of that determination or "to file an appeal in the United States District Court or anywhere else." Dismissal of the instant case will thus leave binding on petitioner the IRS' July 17, 2015, determination to deny her claim for an award. "[I]n the exercise of the Court's discretion, and after weighing the relevant equities including the lack of a clear legal prejudice to respondent," we will accordingly grant petitioner's motion to dismiss.

The "binding" effect of the WBO's determination

The extent to which such a dismissal is with or without "prejudice" is not completely articulated in Jacobson, where the motion to dismiss was unopposed, and the motion did not explicitly state whether the asked-for dismissal was to be with or without prejudice. The opinion does observe that the dismissal "leave[s the final determination] binding", but it does not explicitly characterize the permissible

dismissal as "with prejudice". That phrase likewise does not appear in the subsequent order dismissing the case.

On the one hand, it is clear that the dismissal of the Tax Court suit does (in the words of Jacobson) "leave binding on petitioner the [WBO's July 2016] ... determination to deny [his] claim for an award" concerning AmSub--but it is binding by virtue of Mr. Insinga's inability to file another timely petition founded on that July 2016 determination. Since the time limit for filing a timely whistleblower petition is so very short--a mere 30 days--the claimant has only a very brief opportunity to file a timely petition. Because the WBO's final determination on Mr. Insinga's July 2016 claim was made almost 2 years ago, Mr. Insinga has no right to file another petition in our Court for review of that determination. If we grant his motion and dismiss this case, then it seems Mr. Insinga can never file another petition seeking a holding that the WBO abused its discretion in issuing its July 2016 final determination--even if we were to declare that the dismissal is "without prejudice".

If Mr. Insinga contends otherwise, then he should so explain in the reply he files in response to this order.

The possibility of a subsequent petition founded on a subsequent determination

On the other hand, it is not clear that a dismissal "with prejudice" would have much greater effect. Even if we were to dismiss this case "with prejudice", it appears that such a dismissal could not preclude a future case founded on a new final determination, even if that new determination denied an award claim by Mr. Insinga involving AmSub. If the WBO were to issue a new determination regarding information Mr. Insinga submitted about AmSub, then that new determination would support jurisdiction for a new case in the Tax Court. We have the jurisdiction to review any timely petitioned determination on a whistleblower claim. In Comparini v. Commissioner, 143 T.C. 274, 281-282 (2014), this Court held that section 7623(b)(4) "provid[es] the Tax Court with jurisdiction over 'any' timely petitioned determination".

To put the same point another way, the subject matter of the instant case is the WBO's exercise of discretion in issuing its July 2016 final determination. Even if we dismiss "with prejudice" a petition challenging that final determination, it would seem that that dismissal would not bar a subsequent petition challenging a subsequent determination, even if both determinations addressed claims made by Mr. Insinga, regarding AmSub. By so saying we do not mean to suggest that the

subsequent petition could entitle Mr. Insinga to the Tax Court's review of any more than the subsequent determination. It seems we could instead review only the WBO's exercise of discretion in issuing that subsequent determination. But dismissal of this case, even "with prejudice", would not seem to address with absolute finality the possibility of a whistleblower award to Mr. Insinga involving AmSub.

If the Commissioner contends otherwise, then he should so explain in the sur-reply he files in response to this order.

It is

ORDERED that, no later than August 17, 2018, Mr. Insinga shall file a reply to the Commissioner's response, in which Mr. Insinga shall also address the foregoing. It is further

ORDERED that, no later than August 31, 2018, the Commissioner shall file a sur-reply to Mr. Insinga's reply, in which the Commissioner shall also address the foregoing.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
July 25, 2018