

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

WILLIAM S. SCOTT,)	
)	CIVIL ACTION NO. 1:24-cv-24123
Plaintiff,)	
)	Judge: Hon. Cecilia M. Altonaga
v.)	
)	
INTERNAL REVENUE SERVICE,)	
)	
Defendants.)	
)	

**UNITED STATES OF AMERICA’S MOTION TO DISMISS AND
MEMORANDUM OF LAW IN SUPPORT**

The United States of America, on behalf of the named defendant the Internal Revenue Service,¹ moves to dismiss Plaintiff William S. Scott’s suit pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Plaintiff seeks judicial review of the IRS’s decision not to pursue judicial or administrative proceedings based on his whistleblower information, as well as the denial of his whistleblower claims. The Court should dismiss the action because: (1) the district court lacks subject matter jurisdiction to hear an appeal of a denial of whistleblower claims, (2) the United States has not waived its sovereign immunity under either the Internal Revenue Code (“IRC”) or the Administrative Procedure Act (“APA”), and (3) the IRS’s decision whether or not to institute investigative or enforcement proceedings is an action committed to agency discretion by law under 5 U.S.C. section 701(a)(2).

¹ The plaintiff improperly named the Internal Revenue Service as the defendant in this matter. The IRS is not a suable entity. “Congress has not constituted the Treasury Department or any of its divisions or bureaus as a body corporate and has not authorized either or any of them to be sued *eo nomine*.” *Castleberry v. Alcohol, Tobacco & Firearms Div. of Treasury Dep’t of U.S.*, 530 F.2d 672, 673 n.3 (5th Cir. 1976); *see also Boyle v. Internal Revenue Service*, 194 F.3d 1316 (9th Cir. 1999) (suit against the IRS dismissed due to lack of waiver of sovereign immunity) (citing *Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1952)).

INTRODUCTION

This case arises from the IRS’s denial of an award from a whistleblower claim. The IRS encourages people with knowledge of tax fraud or evasion to come forward by offering rewards for information. *See* 26 U.S.C. § 7623. Generally, if the IRS begins an administrative or judicial proceeding based on the tip received, the whistleblower who provided the vital information is eligible to receive up to 30 percent of the proceeds collected as a result of the action. *See* 26 U.S.C. § 7623(b)(1), (2). If the IRS does not file an administrative or judicial proceeding based on the information provided by the whistleblower, or no proceeds were collected by the IRS as a result of such whistleblower information, there is no whistleblower award. *See Cooper v. Commissioner*, 136 T.C. 597, 600-601 (2011); *see also Meidinger v. Commissioner*, 559 F. App’x 5, 6 (D.C. Cir. 2014); *Simmons v. Commissioner*, 523 F. App’x 728, 729-730 (D.C. Cir. 2013). A whistleblower may appeal to the Tax Court “[a]ny determination regarding an award.” *See* 26 U.S.C. § 7623(b)(4).

On or about May 24, 2024, Scott filed Form 211, Application for Award for Original Information, (“Form 211”) making such a whistleblower claim with the IRS. *See* ECF No. 1 ¶ 10, Complaint Exhibit 1 at ECF No. 1 pp. 9-16. Scott’s claim alleged that the Bill and Melinda Gates Foundation and the Bill and Melinda Gates Foundation Trust (collectively the “Foundation”) should be treated as a for-profit business rather than a tax exempt organization. *See* ECF No. 1 ¶¶ 7, 10, Complaint Exhibit 1 at ECF No. 1 pp. 9, 15. Approximately four months later, on September 26, 2022, the IRS sent Scott a “Final Determination under Internal Revenue Code (IRC) Section 7623(a) – Denial” denying his claims because “the information [Scott] provided did not result in the collection of any proceeds” and therefore Scott was “not eligible for an award.” *See* ECF No. 1 ¶ 12, Complaint Exhibit 2 at ECF No. 1 p. 17. The

Plaintiff brought this action under 26 U.S.C. section 7623(b)² and the APA asking the Court to: (1) set aside the IRS's denial of his whistleblower claims, and (2) issue a writ of mandamus ordering the IRS to fully investigate the claims asserted against the Foundation. *See* ECF No. 1 pp. 1, 7. In doing so Scott attempts to recategorize the IRS's denial of his whistleblower claim as a "threshold rejection." *See* ECF No. 1 ¶¶ 3, 13, Complaint Exhibit 1 at ECF No. 1 p. 17.

This court lacks subject matter jurisdiction to hear an appeal of a denial of whistleblower claims because Congress vested the United States Tax Court with exclusive jurisdiction over appeals of "any determination regarding awards" under section 7623. 26 U.S.C. § 7623(b)(4). The United States has also not waived its sovereign immunity under either section 7623 or the APA. Congress, through section 7623, only waived sovereign immunity for whistleblower claim challenges brought in the Tax Court. Review under the APA is impermissible because the Plaintiff has another adequate remedy in court, beyond judicial review of the IRS's actions in district court. *See* 5 U.S.C. §§ 702, 704. The APA also does not allow for judicial review of the IRS's decision whether or not to institute investigative or enforcement proceedings of other taxpayers based on the Plaintiff's tips because that agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2); *Stone v. Commissioner*, 86 F. 4th 1320, 1331 (11th Cir. Nov. 17, 2023), cert denied, 144 S. Ct. 1119, 2024 U.S. LEXIS 1519 (2024).

ARGUMENT

I. The District Court Lacks Subject Matter Jurisdiction Over Appeals of IRS Determinations Denying Whistleblower Claims.

Section 7623 of the Internal Revenue Code governs the payment of awards to whistleblowers. *See* 26 U.S.C. § 7623. Pursuant to that section, the IRS may proceed with

² Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C. ("IRC").

administrative or judicial action based on information a claimant provided in a Form 211 application. 26 U.S.C. § 7623(b)(1). The IRS Whistleblower Office (“WBO”) may award a claimant up to 30 percent of the proceeds collected as a result of the action. *See* 26 U.S.C. § 7623(b)(1), (2). Upon receiving information from a claimant, the WBO makes a final determination either rejecting or denying a claim under section 7623(b) and will communicate its decision, in writing, to the claimant. *See id.*; 26 C.F.R. §§ 301.7623-3(b)(3), (c)(7) - (c)(8) (defining and differentiating rejections from denial determinations where the IRS “either did not proceed based on the information provided . . . or did not collect proceeds”). The claimant may appeal the WBO’s final determination to the United States Tax Court within thirty days of the denial. *See* 26 U.S.C. § 7623(b)(4). Federal district courts do not have jurisdiction to review denials, section “7623(b)(4) makes clear that appeals from the denial of a Form 211 application are to be filed with the Tax Court. Nothing in that section confers jurisdiction on the district court to review determinations made by the Whistleblower’s Officer or the Tax Court.” *See Meidinger v. Commissioner*, 662 F. App’x 774, 776 (11th Cir. 2016), cert. denied, 137 S. Ct. 1242 (2017); *Stone v. Commissioner*, No. 22-80154-CIV-MARRA, 2022 U.S. Dist. LEXIS 99592, *11 (S.D. Fla. June 2, 2022), *aff’d*, 86 F.4th 1320 (11th Cir. 2023) (affirming the district court’s dismissal of an appeal from an IRS denial of a whistleblower claim for lack of subject matter jurisdiction).

Here, the IRS denied Scott’s claim by sending him a “Final Determination under Internal Revenue Code (IRC) Section 7623(a) – Denial” because “the information [Scott] provided did not result in the collection of any proceeds” and therefore Scott was “not eligible for an award.” *See* ECF No. 1 ¶ 12, Complaint Exhibit 2 at ECF No. 1 p. 17. While Scott incorrectly attempts to recharacterize the IRS’s determination as a “threshold rejection”, it is in fact, based on the

plain language of the determination letter, a denial. Accordingly, the district court lacks subject matter jurisdiction over the Plaintiff's claim as section 7623 vests exclusive jurisdiction with the Tax Court over such appeals of whistleblower claims. *See* 26 U.S.C. 7623(b)(4); *Meidinger*, 662 F. App'x at 776; *see also Meidinger v. Commissioner*, 989 F.3d 1353, 1357-58 (Fed. Cir. 2021) (holding that the Tax Court has exclusive jurisdiction over § 7623 claims).

II. The United States has not waived its sovereign immunity.

To bring a claim against the United States, a plaintiff must show that the government has waived sovereign immunity specifically allowing a challenge to an agency's action or inaction. *Lane v. Pena*, 518 U.S. 187, 192 (1996). A waiver of sovereign immunity must be "unequivocally expressed" in the relevant statute and should be strictly construed in favor of the government. *Id.* (citing *United States v. Williams*, 514 U.S. 527, 531 (1995); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992)).

The IRC specifies that the Tax Court has jurisdiction over appeals of whistleblower claim decisions and that appeals must be brought within 30 days of a determination. *See* 26 U.S.C. § 7623(b)(4). Section 7623 only operates as a waiver of sovereign immunity in the Tax Court, not in federal district court. *See Meidinger*, 989 F.3d at 1357-58; *Meidinger*, 662 Fed. App'x 776 ("26 U.S.C. § 7623(b)(4) makes clear that appeals from the denial of a [whistleblower] application are to be filed with the Tax Court."). *See also Li v. Commissioner*, 22 F.4th 1014, 1017 (D.C. Cir. 2022) (noting that § 7623 "gives the Tax Court exclusive jurisdiction" but only when there is a "determination regarding an award," which does not include outright rejections of whistleblower award requests that are "vague and speculative"). Therefore, the Plaintiff is precluded from bringing a direct challenge in federal district court under section 7623 to the IRS's determinations on his whistleblower claims.

If a plaintiff is adversely affected by the action of a federal agency, the APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. §§ 702, 704; *see also Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (Congress did not intend for the APA to duplicate existing procedures for review of agency action.). An adequate remedy need not be identical to APA relief. *See Citizens for Responsibility & Ethics in Washington v. DOJ*, 846 F.3d 1235, 1245 (D.C. Cir. 2017). A remedy is considered “adequate” when there is legislative intent to “create a special, alternative remedy and thereby bar APA review.” *Id.* at 1244. When a statute offers “an independent cause of action or an alternative review procedure,” courts have found the remedy adequate. *Id.* at 1245 (quoting *El Rio Santa Cruz Neighborhood Health Center v. HHS*, 396 F.3d 1265, 1270 (D.C. Cir. 2005)); *see also Bowen*, 487 U.S. at 903 (“§ 704 ‘does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.’”).

Here, the Plaintiff seeks review of a final agency action, but there is another adequate remedy in a court. The Plaintiff had the opportunity to challenge the IRS’s decision on his whistleblower claims in the Tax Court. *See* 26 U.S.C. § 7623(b)(4); *Meidinger*, 662 F. App’x at 775-76. The Tax Court has jurisdiction to order the IRS to award whistleblower claims in full, thereby offering the Plaintiff the same final remedy he seeks in this Court. *See* 26 U.S.C. § 7623(b)(4). The Tax Court appeal is still an adequate remedy even if it does not allow for a full administrative review of the IRS’s decision. *See Citizens for Responsibility & Ethics in Washington*, 846 F.3d at 1245. The fact that Scott elected to file an appeal in the district court instead of the Tax Court does not change the fact that Congress provided an avenue for relief outside of the APA. As a result, because the Plaintiff had an opportunity to challenge his

whistleblower claim denial in Tax Court, there is no subject matter jurisdiction here to allow for further judicial review under the APA.

III. The APA Does Not Provide a Waiver of Sovereign Immunity for Review of Actions Congress Committed to Agency Discretion.

Although the APA offers courts jurisdiction to review agency action, the United States' sovereign immunity against such nonmonetary relief is only waived in "challenges to a final agency action that is not committed to agency discretion by law." *See Reid v. IRS*, No. 21-12087, 2021 U.S. App. LEXIS 37408, at *6 (11th Cir. Dec. 17, 2021) (per curiam) (citing 5 U.S.C. §§ 701(a)(2), 704). Thus, if the statute authorizing agency action provides "no meaningful standard against which to judge the agency's exercise of discretion," APA review is precluded. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

More broadly, where statutes only provide that an agency "may" commence a civil action, the agency's prosecutorial discretion prevents a challenge to its decision on whether to bring such a claim. *See Citizens for Responsibility & Ethics v. FEC*, 993 F.3d 880, 885 (D.C. Cir. 2021) (quoting *Citizens for Responsibility & Ethics in Washington v. FEC* ("Commission on Hope"), 892 F.3d 434, 439 (D.C. Cir. 2018)) ("the word 'may' imposes no constraints on [an agency's] judgment about whether, in a particular matter, it should bring an enforcement action."). Agencies have the presumptive discretion to bring, or not bring, civil enforcement suits consistent with Article II of the United States Constitution. *Id.* at 888. Article II's Vesting Clause offers the Executive Branch the exclusive power to make enforcement decisions without the threat of challenges to its discretion. *Id.* at 887-888 (citing *Heckler*, 470 U.S. at 831-32). The passage of the APA did not alter the extensive body of case law on Executive Branch discretion under the Vesting Clause. *Id.* at 887 (citing *Heckler*, 470 U.S. at 832).

Nor does section 7623 give courts authority to order the IRS to begin an investigation of a taxpayer. By statute, Congress has authorized, but not mandated, the Secretary of the Treasury to bring administrative or judicial actions based on information received from whistleblowers. *See* 26 U.S.C. § 7623. The Secretary is not obligated by statute to take any specific action based on the information received. *See id.* § 7623(b)(1) (“**If** the Secretary proceeds with any administrative or judicial action” (emphasis added)). Neither the Tax Court nor the district court have jurisdiction to order the IRS to investigate a claim based on information from a whistleblower. *See Stone*, 86 F. 4th at 1330-1332; *Simmons v. Commissioner*, No. 17-1114, 2018 U.S. App. LEXIS 8186, at *2-3 (D.C. Cir. Mar. 29, 2018); *see also Meidinger*, 559 Fed. App’x at 6. The Eleventh Circuit affirmed district courts’ decisions that it lacked authority to order the IRS to reopen an investigation of allegedly improper tax practices at a whistleblower’s request. *Stone*, 86 F. 4th at 1331-1332; *Meidinger*, 662 Fed. Appx. at 775-776.

Neither the specific statute, section 7623, nor the more general APA, provide a basis for the relief the Plaintiff seeks. Congress’s broad grant of authority in section 7623 gives no meaningful standard against which a court may judge the IRS’s exercise of prosecutorial discretion in deciding whether to investigate a whistleblower’s tip. *See Stone*, 86 F. 4th at 1329-1331. Consequently, there is no waiver of sovereign immunity here that would allow the Plaintiff’s case against the United States to proceed. *See Norvell v. Secretary of the Treasury*, 821 F. App’x 853, 854 (8th Cir. 2020) (APA’s waiver of sovereign immunity does not apply to cases seeking review of actions based on 26 U.S.C. § 7623).

Nor does any other provision of the IRC provide a “meaningful standard” for review of the IRS’s decisions. Choices about how to allocate agency resources are exactly the kind of decisions that courts have long recognized are within the purview of an agency. As the Supreme

Court has “repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”

Massachusetts v. EPA, 549 U.S. 497, 527 (2007). In sum, the IRS has discretion to not investigate whistleblower claims, and the APA does not waive the United States’ sovereign immunity to allow a judicial review of this agency action.

CONCLUSION

The district court lacks subject matter jurisdiction over an appeal of the IRS’s final determination denying a claim under section 7423. The United States has not waived sovereign immunity to allow this suit to be brought under the IRC or APA. The APA does not allow for judicial review of final agency actions for which another adequate legal remedy exists – such as the opportunity to bring a claim in Tax Court. The APA also does not allow review of agency actions which Congress has committed to agency discretion, such as the IRS’s decisions whether or not to institute investigative or enforcement proceedings against a taxpayer based on whistleblower claims. For all these reasons, the United States requests that the Complaint be dismissed with prejudice.

CERTIFICATE OF CONFERRAL

Counsel for the movant conferred with *pro se* plaintiff William S. Scott, the sole party to this matter, by email on December 19–20, 2024. Counsel for the movant informed Mr. Scott that the United States intended to move to dismiss and offered to discuss the motion by phone. On December 20, 2024, Mr. Scott declined to discuss the motion by phone and advised the undersigned by email that he objected to this motion. Accordingly, counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

Dated: December 20, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the font and point selections approved by the Court in Local Rule 5.1(a). This document has been prepared in Times New Roman font, 12-point font.

/s/ Matthew L. Paeffgen
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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, the undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will serve a copy upon all parties.

/s/ Matthew L. Paeffgen

MATTHEW L. PAEFFGEN

Trial Attorney

U.S. Department of Justice, Tax Division