No. 21-1133

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PATRICK KENNEDY,
PETITIONER-APPELLANT
V.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

ON APPEAL FROM THE ORDER AND DECISION OF THE
UNITED STATES TAX COURT

REPLY BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF PETITIONER-APPELLANT

JACKLYN DE MAR
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19TH STREET NW, #501
Washington, D.C. 20036
(202) 296-4826
jdemar@taf.org

PAUL D. SCOTT *
LANI ANNE REMICK
LAW OFFICES OF PAUL D. SCOTT, P.C.
640 WASHINGTON STREET
SAN FRANCISCO, CA 94111
(415) 981-1212
pdscott@lopds.com
laremick@lopds.com

*Counsel of Record

Counsel for Amicus Curiae

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GLOSSARY

Amicus	Taxpayers Against Fraud Education Fund
Am. Br.	Amicus Brief
Appellee Supp. Br.	Appellee Supplemental Brief
Code	Internal Revenue Code (26 U.S.C.)
Commissioner	Commissioner of Internal Revenue, Respondent-Appellee
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS or the Service	Internal Revenue Service
Treas. Reg.	Treasury Regulations (26 C.F.R.)
WBO	IRS Whistleblower Office

I. ARGUMENT

A. *Li* Did Not Resolve Whether the Tax Court Has Jurisdiction Over "Denials."

The Commissioner's argument regarding the Tax Court's jurisdiction over denials by the WBO is not grounded in the plain meaning of the governing statute or its legislative history. Instead, the Commissioner emphasizes one line in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022) ("*Li*") to argue the Tax Court does not have jurisdiction over almost all challenges to WBO denials, unless the whistleblower first establishes that (1) the IRS took action based on the whistleblower's information and (2) collected proceeds as a result. The Commissioner bases this argument on the following statement by the Court in *Li*:

> Per subsection (b)(1), an award determination by the IRS arises only when the IRS '*proceeds* with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by [the whistleblower] . . . .'

Li, 22 F.4th at 1017 (quoting 26 U.S.C. § 7623(b)(1)) (emphasis in original); Appellee Supp. Br. at 4.

From this sentence, the Commissioner concludes "*Li*'s reasoning regarding when a reviewable award determination occurs is [not just applicable to rejections by the WBO but is] equally applicable to cases involving" the denials described in Treas. Reg. § 301.7623-3(c)(8), i.e., denials based on the assertion the action taken

by the Government was not based on the whistleblower's information or that the Government failed to collect proceeds from such action. Appellee Supp. Br. at 5.

The Commissioner's interpretation of *Li*, however, is at odds with other language in the decision, making it clear the Court's ruling was far narrower than the Commissioner suggests. At the outset, the Court explicitly limited its ruling to the following question: "The jurisdictional issue in this case asks whether § 7623(b)(4) gives the Tax Court jurisdiction over the threshold first step, the initial rejection of a whistleblower award *before the WBO makes an award determination under subsections (b)(1)-(3)*." *Li,* 22 F.4th at 1016 (emphasis added). The Court thus specifically excluded from the scope of its decision the Tax Court's jurisdiction over "award determinations" by the WBO under 26 U.S.C. § 7623(b)(1), which includes denials under Treas. Reg. § 301.7623-3(c)(8). *Id.*

As previously observed, the Court also stated directly in a footnote that its ruling was not meant to resolve "whether the Tax Court would have jurisdiction to hear a whistleblower's claim in a case in which the IRS wrongly denied a Form 211 application but nevertheless proceeded against a target taxpayer based on the provided information." *Li,* 22 F.4th at 1017 n.2. The Commissioner argues this footnote is not pertinent "because *Li* was a rejection case in which the Court addressed only the first prerequisite [i.e., whether the IRS took action based on the

whistleblower's information]." Appellee Supp. Br. at 10. But even if the footnote did not explicitly reserve for later how the Court would rule in cases where action had been taken but the existence of collected proceeds was disputed, the fact still remains that the Court's ruling in *Li* explicitly reserved judgment on whether the Tax Court had jurisdiction over a large category of award denials, after the rejection stage, that centered on whether the Government had taken action against a taxpayer based on whistleblower information.

Later, the *Li* Court noted two key undisputed facts - "the WBO did not forward Li's Form 211 to an IRS examiner for further action, and the IRS did not take any action against the target taxpayer" – in explaining why "[t]here was no proceeding and thus no 'award determination' by the IRS for Li's whistleblower information." *Li,* 22 F.4th at 1017. The Court thus once again made clear that its decision on jurisdiction might be different in a case where a claim cleared the rejection threshold and was later denied after being forwarded to the enforcement division.

The Commissioner separately argues that this Court's discussion in *Li* regarding *Cooper v. Commissioner*, 135 T.C. 70 (2010) and *Lacey v. Commissioner*, 153 T.C. 146 (2019) "abrogated the Tax Court's precedent" that allowed for the review of denials under Treas. Reg. § 301.7623-3(c)(8) regarding whether the IRS took action based on the whistleblower's information or collected

proceeds based on that information. Appellee Supp. Br. at 8. But the Court could not have been more plain in stating in multiple ways that it was only overruling the two Tax Court cases to the extent they held "that an *initial rejection* of a whistleblower award is . . . an award determination under subsection (b)(4)." *Li,* 22 F.4th at 1016 (emphasis added).

In short, the Commissioner's contentions as to the import of the *Li* decision are mistaken. As outlined in Amicus's opening brief, the Court should look in the first instance to the relevant statutory language, its legislative history, the agency's own regulations, and the policies underlying the IRS whistleblower program to decide the jurisdictional issues of first impression being raised by the Commissioner in this and other cases. *See Lissack v. Commissioner*, No. 21-1268 (D.C. Cir.), *In re: Sealed Case*, No. 21 -1197 (D.C. Cir.), and *Villa-Arce v. Commissioner*, No. 22-1006 (D.C. Cir.).[1]

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[1] When discussing the expansive language of 26 U.S.C. § 7623(b)(4), the Commissioner makes an erroneous assumption regarding the basic point being made by Amicus, then strikes the strawman down. The Commissioner states that the "the phrase '[a]ny determination regarding an award under paragraph (1), (2), or (3)' [in I.R.C. § 7623(b)(4)] does not mean any determination of the WBO, or a determination 'of whatever kind'" as Amicus argues." Appellee Supp. Br. at 3. Instead, the Commissioner argues, "*Li* holds that the phrase refers only to 'award determinations.'" *Id.* (citations omitted). The Commissioner thus suggests Amicus is arguing the Tax Court has jurisdiction over something beyond award determinations and cites *Li* to prove Amicus's point wrong. In fact, Amicus has never argued that a determination "of whatever kind" can be appealed. Amicus's argument has always specifically included the key limitation, consistent with the

B. "Denials" are Not Substantively Equivalent to "Rejections."

The Commissioner adopts the moniker "threshold denials" to describe denials under Treas. Reg. § 301.7623-3(c)(8) and argues they are equivalent to what this Court in *Li* described as "threshold rejections" under Treas. Reg. § 301.7623-3(c)(7). According to the Commissioner, "threshold rejections and threshold denials are very similar, since both represent preliminary administrative 'determinations' that end the consideration of a whistleblower's claim at a threshold step before any substantive determination of an award (at a stage when it is clear that no award could ever be paid because the statutory prerequisites for such an award are not met)." Appellee Supp. Br. at 8. Amicus strongly disagrees with these assertions, but they are helpful in that they clarify two important substantive flaws in the Commissioner's reasoning.

First, referring to all denials under Treas. Reg. § 301.7623-3(c)(8) as "threshold denials" is a misnomer, for unlike rejections, denials do not occur only at the "threshold" of a matter. Denials of claims under (c)(8) can and often do occur well after a whistleblower claim is forwarded to and reviewed by the enforcement division, the exam of the taxpayer is completed, and the Government

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statute, that appealable determinations are limited to "determinations 'of whatever kind' by the Service 'with respect to' *an award under paragraphs (1), (2), or (3) of section 7623(b)*." Amicus Br. at 13 (emphasis added).

has recovered from the taxpayer. Denials are thus issued in far different circumstances from "threshold rejections" addressed by the Court in *Li,* which involve claims that never made it past the first level of review and were never forwarded to the operating division for further proceedings.

It is also not at all "clear" without the resolution of factual disputes that "no award could ever be paid" in the case of a denial under (c)(8). For example, the IRS can issue denials based on the assertion that a whistleblower's information, though relevant and timely, was not used and thus did not substantially contribute to the action taken by the IRS. The underlying facts may show, however, that the Service did, in fact, rely substantially on the whistleblower's information. Similarly, the IRS can issue a denial on the basis that, while it collected proceeds against the taxpayer as part of an examination involving the claimant's information, the proceeds were not collected based on the issue raised by the claimant. Again, the facts may show that the IRS's recovery actually was tied to the whistleblower's information, as might be the case, for example, if the WBO's decision is contradicted by information provided by IRS agents who worked on the matter. Lastly, claims can potentially be denied on invalid grounds before proceeds are later collected. Thus, the possibility of an award exists so long as there is an avenue to appeal, within the 30 days provided by Section 7623(b)(4), before proceeds are collected. In these and other circumstances outlined in Amicus's

opening brief, Amicus Br.at 14-17, it is generally anything but "clear" from the competing allegations of the petitioner and the respondent in Tax Court cases as to whether a particular denial was justified, which is precisely why Tax Court jurisdiction is necessary and why the program was amended by Congress to provide an avenue for such review. Tax Relief and Health Care Act of 2006, Pub. L. 109—432, div. A., sec. 406, tit. IV, 120 Stat. 2922, 2958-60 (2006).

C. Section 7623(b)(4) Only Requires Non-Frivolous Allegations a "Denial" Was Erroneous.

The Commissioner cites *Brownback v. King*, 141 S. Ct. 740 (2021) as justification for conflating the analysis of jurisdiction and the merits of denials in Tax Court cases, Appellee Supp. Br. at 11, but the *Brownback* case demonstrates that there is no good reason to do so when the statutory language in question does not compel such a result. As the Court observed in *Brownback,* the "unique context of the [Federal Tort Claims Act]" creates a situation where "all elements of a meritorious claim are also jurisdictional," because the jurisdictional provision at issue, which waives sovereign immunity, specifically lists the elements of liability as preconditions to jurisdiction. *Brownback*, 141 S. Ct. at 749.[2] By contrast, the

[2] The Federal Torts Claims Act, 28 U.S.C. § 1346, grants jurisdiction only for claims that are: "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the

jurisdictional provision at issue here simply says the Tax Court shall have jurisdiction over "[a]ny determination regarding an award . . . ." 26 U.S.C. § 7623(b)(4). Accordingly, there is no basis in the relevant statute for requiring whistleblowers in Tax Court to prove the merits of their claim in order to establish the Court's jurisdiction.

When determining its jurisdiction, the Tax Court has generally held a "whistleblower satisfie[s] the whistleblower's pleading burden by alleging facts that respondent proceeded with an action against the targets using information brought to respondent's attention by the whistleblower . . . ." *Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396, at 402 (2014).[3]

This Tax Court standard in whistleblower cases is equivalent to the general test for federal-question jurisdiction. "In most cases, a plaintiff's failure to state a claim under Rule 12(b)(6) does not deprive a federal court of subject-matter jurisdiction." *Brownback*, 141 S. Ct. at 749 (citations omitted). A plaintiff "need

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United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.*at § 1346(b).

[3] As noted previously, *Whistleblower 11332-13W* was cited favorably by this Court in *Pinnavaia v. Internal Revenue Service*, No. 21-5228, 2022 WL 566475 (D.C. Cir. Feb. 23, 2022) (unpublished). The Commissioner argues that "Amicus's reliance on this Court's citation to *Whistleblower 11332-13W* is unavailing" because "this Court's citation to that case in *Pinnavaia* simply referred to the Tax Court's description of the WBO's procedures for processing whistleblower claims and making award determinations . . . ." Appellee Supp. Br. at 10. In fact, the Court cited pages 401-402 of *Whistleblower 11332-13W*, which included the directly relevant holding from *Whistleblower 11332-13W* quoted in text above.

not *prove*" jurisdictional elements. *Id*. (emphasis original). "Dismissal for lack of subject matter jurisdiction . . . is proper only when the claim is so . . . completely devoid of merit as not to involve a federal controversy." *Id.* (internal citations omitted). *See also Agudas Chasidei Chabad of U.S. v. Russian Fed.*, 528 F.3d 934, 940 (D.C. Cir. 2008) ("[T]o the extent that jurisdiction depends on the plaintiff's asserting a particular type of claim, and it has made such a claim, there typically is jurisdiction unless the claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or ... wholly insubstantial and frivolous,' i.e., the general test for federal-question jurisdiction under *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and *Arbaugh v. Y H Corp.*, 546 U.S. 500, 513 n. 10, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).") (internal footnote omitted); *Feldman v. Fed. Deposit Ins. Corp.*, 879 F.3d 347, 351 (D.C. Cir. 2018) (where factual allegations underlying jurisdiction challenged, plaintiff should be given the "benefit of all reasonable inferences"); *Cf Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); Jacob J. Taber, Note, *Silly Jurist, Twiqbal's for Claims: Pleading Jurisdiction after Twombly and Iqbal*, 89 N.Y.U. L. Rev. 1867 (2014) (comparing the *Twombly* and *Iqbal* "plausibility" standard

applied to Rule 12(b)(6) motions with the lower pleading standards applicable to jurisdictional challenges, and noting confusion in the courts regarding the same).

This approach also avoids the problem identified by the Tax Court in *Whistleblower 972-17W v. Commissioner*, 159 T.C. No. 1, 26 (2022) that arises from the fact that the Tax Court generally "review[s] whistleblower determinations for abuse of discretion based on the administrative record. . . ." As the Tax Court noted, "any proceeding to establish whether an action was 'based on' the whistleblower's information for jurisdictional purposes would [therefore] raise complicated questions regarding the scope and standard of [Tax Court] review." *Id*.

Even if, despite all the foregoing, the Court were to accept the Commissioner's argument that it was not enough for the whistleblower simply to make a non-frivolous allegation of the nature of their claim, and it held that Tax Court jurisdiction required proof the Government took action based on the whistleblower's information and collected proceeds as a result, any such jurisdictional determination would still have to be deferred until resolution of the merits of the case.

The Commissioner cites *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) for the proposition that, "[i]f a decision about [subject matter jurisdiction] requires resolution of factual

disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible." *See* Appellee Supp. Br. at 12. This quote, however, omits the Court's explanation for why the jurisdictional issue had to be resolved promptly in that case – *viz*, the need to resolve jurisdictional issues involving foreign sovereigns as promptly as possible. *Id.* at 1317 ("[C]onsistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible.") (emphasis original) (citations omitted). Such concerns are plainly not applicable here.

As this Court held in *Herbert v. National Academy of Sciences*, 974 F.2d 192 (D.C. Cir. 1992), "if [jurisdictional facts] are inextricably intertwined with the merits of the case [the trial court] should usually defer its jurisdictional decision until the merits are heard." *Id.* at 198 (*citing Land v. Dollar*, 330 U.S. 731 (1947)). "This proviso to the usual rule ensures that, where jurisdictional defenses and the merits of a dispute overlap, the jurisdictional defense is not used—in the absence of special considerations—to short-circuit the factual development and adjudicative process to which a plaintiff is generally entitled." *Am. Oversight v. U.S. Department of Veteran Affairs*, 498 F. Supp. 3d 145, 153 (D.D.C. 2020). *See also Feldman*, 879 F.3d at 351 ("[W]eighing the plausibility of [plaintiff's

jurisdictional] allegations was for a later stage of the proceedings . . . , as was assessing the credibility of [plaintiff's jurisdictional] allegations.") (internal citations omitted).

In sum, there is no unique necessity for the Court to combine its jurisdictional and merits analysis here as it is compelled to do in the FTCA context, nor is there a pressing need to resolve jurisdiction at an early stage due to the involvement of a foreign sovereign. The Commissioner has also cited no authority to support its contention that whistleblowers should be compelled to prove (rather than just make non-frivolous allegations) that a denial was mistaken to establish Tax Court jurisdiction. Indeed, given the unique feature of whistleblower appeals, where, prior to the filing of an action, the IRS generally will have exclusive access under 26 U.S.C. § 6103 to non-public information needed to determine whether a denial was valid, the policy considerations underlying the Court's normal approach to jurisdiction have even greater force here than in cases where the plaintiff has equal access to the evidence.

D. The Commissioner's Interpretation of Legislative History is not Persuasive.

The Commissioner contends that the legislative history regarding a whistleblower's right to appeal denials was only meant to refer to the extremely rare event of a denial under 26 U.S.C. § 7623(b)(3) (last sentence), based on the whistleblower being criminally convicted in connection with the underlying tax

noncompliance. Appellee Supp. Br. at 13. The challenge the Commissioner faces with this argument is that the legislative history contains no such limiting language. It simply states a whistleblower may appeal "a denial of an award determination," Joint. Comm. On Taxation, *Technical Explanation of H.R. 6408, The "Tax Relief and Health Care Act of 2006*," as Introduced in the House on December 7, 2006, JCX-50-06, at 89 (2006), and the Commissioner has provided no authority to support its claim that this broadly written language was somehow meant to refer only to the rarest form of denial under (b)(3) and not standard denials under (b)(1) that address whether the IRS took action or collected proceeds based on the whistleblower's information after their claims cleared the rejection stage.[4] *See* Treas. Reg. § 301.7623-3(c)(8).

E. The Commissioner's Own Regulations Support Amicus's Interpretation of Section 7623(b)(4).

The Commissioner attempts to minimize the significance of its own regulations that explicitly state denials can be appealed, noting that the same regulations also allowed for appeals of rejections until abrogated by *Li*. But even if the Court's ruling in *Li* implicitly held that an IRS regulation authorizing appeal of rejections was invalid, that would not invalidate the remainder of the IRS'

[4] Counsel's research has not revealed any case in the history of the Tax Court involving a denial under § 7623(b)(3) based on the whistleblower being criminally convicted for involvement with the conduct alleged in the claim.

regulatory framework,[5] nor would it diminish the point that the Government has historically agreed with Amicus that a whistleblower should be permitted to appeal routine denials under Treas. Reg. § 301.7623-1(c)(8). *See* Treas. Reg. § 301.7623-1(d). As noted previously, the IRS' regulatory framework provides qualitatively different recourse for rejections and denials. The right to appeal a denial is a whistleblower's only means to remedy a substantive error in a denial, while a whistleblower can always simply "perfect and resubmit" a claim when it is rejected. Treas. Reg. § 301.7623-1(c)(4). The regulatory framework itself thus provides a separate and independent reason why appeals of denials should be permitted, irrespective of any rationale for permitting appeal of rejections.

II. CONCLUSION

This Court should apply the plain language of 26 U.S.C. § 7623(b)(4) to exercise jurisdiction over all denials and decline to extend the reasoning of *Li*

[5] If the regulation does not include a severability provision, "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters v. FCC*, 236 F.3d 13, 22 (D.C. Cir.2001); *see also Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir.1997) (provision severable unless there is an "indication that the regulation would not have been passed but for [the] inclusion" of [the invalidated portion of the regulation] and whether severance would 'impair the function of [the valid portions of the regulation]'"). In the instant case, the availability of appeals from denials under (c)(8) is plainly independent of the availability or nonavailability of appeals from rejections under (c)(7), an entirely separate category of determination by the IRS.

beyond the circumstance it was specifically meant to address – threshold rejections of claims by the IRS Whistleblower Office.

Respectfully submitted,

Date: September 27, 2022

By: /s/ Paul D. Scott

Paul D. Scott
Lani Anne Remick
LAW OFFICES OF PAUL D. SCOTT, P.C.
640 Washington Street
San Francisco, CA 94111
pdscott@lopds.com
laremick@lopds.com
Tel: (415) 981-1212

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, DC 20036
jdemar@taf.org
Tel: (202) 296-4826

Attorneys for Amicus Curiae TAFEF

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/s/ Paul D. Scott

Attorney for Taxpayers Against Fraud Education Fund

Dated: September 27, 2022

CERTIFICATE OF SERVICE

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 September 27, 2022.

I further certify that on this 27th day of September, 2022, I electronically mailed a copy of this brief, to the appellant and the appellee, to the following email addresses:

Patrick Kennedy (appellant): patrickkennedy45@gmail.com.

Matthew S. Johnsoy (for appellee): matthew.s.johnshoy@usdoj.gov

Bruce Ellisen (for appellee): appellate.taxcivil@usdoj.gov

I further certify that appellant and appellee agreed to this manner of electronic service in writing in accordance with Fed. R. App. P. 25(c)(2)(B).

A copy was also mailed by first-class mail to the following address:

Patrick Kennedy
8340 W. 103rd Street
Palos Hills, IL 60465

/s/ Paul D. Scott
Paul D. Scott
Attorney