No. 21-12024-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL L. MEYER,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida
No. 18-cv-60704
Hon. Beth Bloom

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant Meyer discloses the following corporate and natural persons who have an interest in this litigation. The identified trial judges and attorneys have an interest in this litigation only to the extent that they have participated in this litigation.

Bloom, Beth (United States District Judge)

Bresnahan, James II

Farajado Orshan, Ariana

Gonzalez, Juan Antonia

Grace Heritage Corporation

Greenberg, Benjamin G.

Internal Revenue Service

Meyer, Michael L.

Neiman, Jeffrey Adam

Phillips, Harris J.

Smachetti, Emily M.

Smith, Casey

Valle, Alicia O. (United States Magistrate Judge)

Vollrath, Derick Roberson

No publicly traded company has an interest in the outcome of this case or appeal.

Date: September 24, 2021

Marcus Neiman Rashbaum & Pineiro LLP

/s/ Derick R. Vollrath
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Attorneys for Appellant Michael Meyer

STATEMENT REGARDING ORAL ARGUMENT

Appellant Michael Meyer desires oral argument of this appeal. Oral argument should be permitted because the case presents a nationwide issue of first impression concerning a matter of significant scope and importance. Oral argument may help the court understand the nuances of the parties' respective positions and the record below.

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STATEMENT OF JURISDICTION

This appeal concerns Appellant Meyer's post-judgment motion for protective order, seeking to compel the United States to refrain from improper use of admissions it obtained under Federal Rule of Civil Procedure 36 in subsequent IRS proceedings (Doc. 98).

The United States District Court for the Southern District of Florida had original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. (Internal Revenue Code) §§ 7402(a), 7407, and 7408. The Court retained jurisdiction over post-judgment discovery. (Doc. 97 at 6.)

On June 14, 2021, the district court entered an order denying Meyer's Motion. (Doc. 112.) Appellant Meyer timely filed a Notice of Appeal that same day, June 14, 2021. (Doc. 113.)

The United States Court of Appeals for the Eleventh Circuit has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court's order disposed of all parties' claims.

STATEMENT OF THE ISSUE

Does the Tax Anti-Injunction Act, 26 U.S.C. § 7421, prohibit a district court from enforcing Federal Rule of Civil Procedure 36(b)'s instruction that "[a]n admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding," when (1) the Rule 36 Admissions were obtained by the IRS in district court litigation and (2) the IRS seeks to use these Rule 36 Admissions in a subsequent penalty examination?

STATEMENT OF THE CASE

Appellant Michael Meyer appeals an order of the Southern District of Florida denying his post-judgment motion for protective order (Doc. 98). This Motion for Protective Order sought to enforce Federal Rule of Civil Procedure 36(b)'s limitation on the use to which a litigant may put admissions obtained pursuant to that rule.

On April 3, 2018, the Internal Revenue Service, acting through Department of Justice's Tax Division, sued Meyer. It alleged that Meyer's tax practice constituted the promotion of an abusive tax shelter. The Government sought to enjoin Meyer from operating his business and sought disgorgement of every dollar that Meyer earned from 1999 through the date of the suit. (Doc. 1 at 53–56.) Meyer denied the government's allegations. But—rather than subject himself to a potential disgorgement judgment clawing back all his earnings during his 20-year career—he ultimately settled the case and agreed to a permanent injunction. (*See* Docs. 95 & 97.) The Court entered a Final Judgment of Permanent Injunction against Meyer on April 26, 2019. (Doc. 97.)

Before settlement, the Parties engaged in discovery. As relevant to this appeal, the government served 1,678 Requests for Admissions upon Meyer, under Federal Rule of Civil Procedure 36. Meyer answered these requests to the best of his ability and with the assistance of counsel. In doing so, he was able to make strategic concessions to narrow the issues for litigation, secure in his knowledge that the Admissions would have no effect outside of the particular suit in which they were sought. As Rule 36(b) states, "An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding." Meyer therefore determined whether to make an admission upon considering the effect on the instant litigation only, without concern that his choice could have consequences in some unknown future forum or proceeding.

However, more than a year later, on July 24, 2020, Meyer received a notice from the IRS's Small Business/Self-Employed Division. This notice informed Meyer that it had determined "the penalty under Section 6700, Penalty for Promoting Abusive Tax Shelters is applicable." The notice included an attached Form 866-A Explanation of Items, in which the IRS detailed the basis of its decision. In concluding

that Meyer engaged in conduct subject to IRC § 6700 penalties, the Explanation of Items relied upon specific citation to Meyer's Rule 36 Admissions that the Department of Justice obtained in the settled injunction litigation. The IRS attached Meyer's Rule 36 Admissions as an Exhibit to its Explanation of Items.

In response to this Explanation of Items, Meyer—through counsel—timely delivered a letter to the IRS protesting the IRS's use of Meyer's Rule 36 Admissions in this fashion in light of Rule 36(b)'s use-limitation. He requested a redetermination of the penalty case without use of those Admissions. The IRS rejected this request in a return letter, stating that it was entitled to use the Admissions in this manner. In doing so, the IRS stated:

> You correctly state the FRCP [Federal Rule of Civil Procedure], however, you fail to take into account that the FRCP are not applicable to administrative determinations made by the Internal Revenue Service. Specifically, the FRCP are applicable to proceedings such as those described in FRCP Rule 81, Applicability of the Rules in General: Removed Actions.

Further efforts to resolve this matter directly with IRS failed. After conferral with opposing counsel at the Department of Justice's

Tax Division, Meyer accordingly filed the Motion for Protective Order in district court that is the subject of the instant appeal.

In that Motion, Meyer argued that while IRS examinations are generally not governed by the Federal Rules of Civil Procedure, the Meyer's Rule 36 Admissions unquestionably are. The district court accordingly had the power to issue such orders necessary to prevent their improper use, especially by a party to the underlying district court litigation. This would include an order prohibiting the IRS from using Meyer's Rule 36 Admissions against him in a subsequent penalty examination.[1]

In making this argument, Meyer pointed the district court to several cases in which courts have entered orders restricting a party's efforts to misuse discovery information even outside of the cases in which that information was obtained. Specifically, Meyer directed the district court to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984); *Whitehurst v. Wal-Mart Stores East, L.P.*, Case No. 3:06-cv-191, 2007

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[1] Although the underlying suit was brought by the Government in the name of the United States, all parties recognize that the IRS is the Department of Justice's client in the matter. Additionally, the IRS is, of course, a component of the United States government.

WL 2993993 (M.D. Fla. Oct. 11, 2007); and *Nevil v. Ford Motor Co.*, Case No. CV 294-015, 1999 WL 1338625 (S.D. Ga. Dec. 23, 1999). Meyer further directed to the district court to Rule 36(b)'s clear instruction that "[a]n admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding." (Doc. 98 at 4.) Meyer asked the district court to vindicate his rights and expectations under this Rule by ordering the IRS to comply with it, and redetermine its penalty examination against Meyer without the improper use of Meyer's Rule 36 Admissions. (Doc. 98 at 7.)

The district court referred the matter to the United State Magistrate Judge "for a Report and Recommendation" pursuant to "28 U.S.C. § 636 and Local Magistrate Judge Rule 1." (Doc. 102 at 1.) The United States then filed its Response. (*See* Doc. 104.)

As its principal argument, the United States maintained that the district court lacked subject-matter jurisdiction over the motion since "the United States has not waived its sovereign immunity because the Anti-Injunction Act bars the relief Meyer seeks." (Doc. 104 at 7.) The "Anti-Injunction Act" to which the United States referred was the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a). It is this argument upon which

the district court ultimately based its decision, and it is this argument that is the crux of this appeal.

Meyer replied, arguing that, by its own terms, the Tax Anti-Injunction Act bars only "suits" maintained "for the purpose of restraining the assessment or collection" of any tax. (Doc. 105 at 3–5.) But Meyer's motion was not a new suit, and instead sought only to enforce the civil rules against the United States as a party litigant to *its own* suit for an injunction against Meyer. (*Id.*)

On April 2, 2021, the Magistrate Judge issued a Report and Recommendation. The Magistrate Judge recommended the district court deny Meyer's Motion. (Doc. 106.) The Report and Recommendation rested entirely upon the United States' principal argument that the Tax Anti-Injunction Act barred Meyer's motion. Specifically, the Report and Recommendation concluded—

> With respect to the Anti-Injunction Act, although Defendant argues that the text of § 7421(a) refers to "suits" and appears to exclude a Motion within the context of an already settled civil action initially brought by the United States, Defendant offers no legal support for that conclusion. In the absence of case law supporting Defendant's interpretation, the Court concludes that, for the reasons discussed below, the relief requested in the Motion violates the policy behind the Anti-Injunction Act and should be denied.

(Doc. 106 at 6.)

The Magistrate Judge accordingly concluded that the Tax Anti-Injunction Act divested the district court of authority to consider Meyer's motion and that "[t]he Court need not determine whether the IRS's use of Rule 36 Admissions within the tax penalty examination is proper." (Doc. 106 at 9.) Nevertheless, the Magistrate Judge's Report "briefly addresses the parties' arguments" on the Motion's merits. (DE 106 at 9.) The Report concluded that although "the literal language of Rule 36(b) would seem to preclude the IRS's subsequent use of Defendant's Rule 36 Admissions in a § 6700 penalty examination," the Rules "simply do not apply to the IRS penalty investigation." (Doc. 106 at 9.)

In recommending denial of Meyer's Motion, the Magistrate Judge instructed that "[w]ithin fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections" pursuant to 28 U.S.C. § 636(b)(1) and S.D. Fla. Local Mag. R. 4(b). These rules provide for review by the district court *de novo*.

Meyer timely objected on April 16, 2021. (Doc. 107.) He objected to the Magistrate Judge's conclusion that the Tax Anti-Injunction Act barred his motion. (Doc. 107 at 5.) And he further argued that the Civil Rules forbid the use of Rule 36 Admissions even in an IRS proceeding. (Doc. 107 at 10.)

With respect to the Tax Anti-Injunction Act, Meyer pointed to the Anti-Injunction Act's text, which plainly applies only to suits brought for the purpose enjoining a tax assessment—and not to motions within a suit brought by the IRS for another purpose. Meyer also emphasized the Second and Third Circuit's decisions in *United States v. Mellon Bank, N.A.*, 521 F.2d 708 (3d Cir. 1975) and *United States v. First National City Bank*, 568 F.2d 853 (2d Cir. 1977), both of which he had previously brought to the attention of the Magistrate Judge. These cases rejected the government's Anti-Injunction Act argument in circumstances analogous to Meyer's.

Turning to the merits of his Motion, Meyer argued that the district court may enforce Rule 36(b)'s use limitations even in the IRS examination. This is not so because the Federal Rules of Civil Procedure apply to IRS investigations. Rather, it is so because the United States

was a party to the litigation in which it obtained the Admissions, and the IRS—as a United States agency and DOJ's client in the matter—is therefore bound by Rule 36(b)'s limitations as a party litigant to that case.

Nevertheless, on June 14, 2021, the district court overruled Meyer's objections and adopted the Report and Recommendation. (Doc. 112.) The Order contained a noteworthy eccentricity with respect to the applicable standard of review.

The order acknowledged that *de novo* review is appropriate. After observing that Defendant timely objected to the Report and Recommendations, the Order stated that "[w]hen a magistrate judge's 'disposition' has been properly objected to, district courts must review the disposition *de novo*." (Doc. 112 at 3.) The Order continued, however, suggesting that Meyer's Objections were inappropriate to the extent they asked the district court to evaluate arguments he had previously made to the Magistrate Judge:

> Defendant's Objections are improper because they largely expand upon and reframe the arguments already made and considered by Judge Valle, or simply disagree with the Report's conclusions. "It is improper for an objecting party to . . . submit [] papers to a district court which are nothing more than a rehashing

> of the same arguments and positions taken in the original papers submitted to the Magistrate Judge. Clearly, parties are not to be afforded a 'second bite at the apple' when they file objections to a [Report and Recommendation]." *Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012) (quoting *Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992)).

(Doc. 112 at 4.) Of course, a proverbial "second bite at the apple" is exactly what *de novo* review affords. If the district court believes the Magistrate Judge erred on a legal point, the Magistrate Judge's decision on the matter is afforded no deference. The district judge decides the matter anew.

Regardless, the district court held that, "as [the Magistrate Judge] correctly determined, while Defendant has not filed a separate taxpayer 'suit,' granting the instant Motion will preclude the IRS from using Defendant's Rule 36 Admissions in the § 6700 penalty examination." Accordingly, "the relief [Meyer] requested will directly affect the IRS's assessment of penalties and violate the very purpose of the Anti-Injunction Act." (Doc. 112 at 5.) The Court denied Meyer's Motion for that reason.

Meyer filed his Notice of Appeal the same day as the district court's Order. (Doc. 113.)

SUMMARY OF THE ARGUMENT

Federal Rule of Civil Procedure 36(b) plainly states that "An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding." The district court erred in interpreting the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), to bar Defendant-Appellant Meyer's Motion for Protective Order seeking to enforce this Rule.

The task of statutory interpretation begins with an Act's plain text. *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015). If the language at issue is unambiguous, this is where the district court's task also ends. *Id.* A court must interpret a statute pursuant to its plain and unambiguous terms.

The text of the Tax-Anti Injunction Act is plain and unambiguous. It states that, subject to limitations not applicable here, "no suit for the purpose of restraining the assessment or collection of any tax" may be maintained. Because Meyer's Motion for Protective Order is not a "suit," Tax Anti-Injunction Act does not apply.

Decisions of the Second and Third Circuit support Meyer's position. In *United States v. Mellon Bank*, N.A., 521 F.2d 708 (3d Cir.

1975) and *United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977), the Second and Third Circuits analyzed the Tax Anti-Injunction Act's text and concluded that it applied only to suits brought by taxpayers. They concluded that it would not bar counterclaims or defenses raised by an intervening taxpayer in an injunction suit brought by the Government. Meyer's case is even more clear, as he seeks only to enforce protections afforded by the Civil Rules in a case brought against him by the Government. The Tax Anti-Injunction Act does not divest the courts of authority to grant this relief.

By contrast, the authority relied upon by the district court is inapposite. Although these cases describe the policy behind the Tax Anti-Injunction Act, they all concern suits brought by taxpayers to enjoin tax assessment or collection. They did not concern cases in which a defendant sought relief upon motion in a suit brought against him by the United States.

STANDARD OF REVIEW

This appeal asks this Court to review the Southern District of Florida's determination that the Tax Anti-Injunction Act bars Meyer's motion for a protective order enforcing Federal Rule of Civil Procedure 36(b)'s limitations on the use to which a litigant may put Rule 36 Admissions. This appeal accordingly concerns the interpretation of a statute, which is a pure question of law subject to *de novo* review. *Hoever v. Marks*, 993 F.3d 1353, 1357 (11th Cir. 2021) ("The interpretation of a federal statute is a question of law that we review *de novo*.").

ARGUMENT

The district court erred in interpreting that the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), to bar the district court from considering Meyer's Motion for Protective Order. Meyer's argument will proceed in three steps.

First, Meyer observes that the Tax Anti-Injunction Act's plain text applies only to suits brought for the purpose of restraining assessment or collection of a tax, and not to motions within suits brought for another purpose. *Second*, Meyer will analyze the only two circuit court decisions to have considered the matter, observing that they support his position. And, *third*, Meyer will address the case law cited by the government and the district court below, and note how they do not support the district court's conclusion.

A. The Tax Anti-Injunction Act does not bar Meyer's Motion for Protective Order pursuant to the Act's plain text.

The Tax Anti-Injunction Act is found at 26 U.S.C. § 7421(a). It reads, in full, as follows:

> Except as provided in section 6015(e), 6212(a) and (c), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and b(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,

> whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a).

Neither Meyer, the Government, nor the district court have identified case law considering whether the Tax Anti-Injunction Act bars motions to enforce limitations that the Federal Rules of Civil Procedure place upon the IRS's use of discovery or other information that it obtains in litigation. The issue that this appeal presents appears to be one of first impression.

The Magistrate Judge's Report and Recommendation faulted Meyer for this lack of caselaw, stating that "[i]n the absence of case law supporting Defendant's interpretation, the Court concludes that, for the reasons discussed below, the relief requested in the Motion violates the policy behind the Anti-Injunction Act and should be denied." (Doc. 106 at 6.)

A close read of the Magistrate Judge's analysis, and the district court's order adopting it, is appropriate. The Magistrate Judge began her interpretation of the statute by looking for caselaw. In the absence of this caselaw, the Magistrate Judge attempted to determine the "policy behind" the Act, and then give effect to that policy. The

Magistrate Judge recognized that "the instant Motion is not a separate taxpayer 'suit,'" within the meaning of the Act. (Doc. 106 at 7.) But she determined that "a protective order in this case would have the same effect as an injunction" by "ultimately precluding the IRS from using Defendant's Rule 36 Admissions in the § 6700 penalty examination." (Doc. 106 at 7.)

The district court approved this reasoning in adopting the Magistrate Judge's Report and Recommendation. The district court held that the Anti-Injunction Act had a "preclusive effect on the instant Motion." (Doc. 112 at 4.) It agreed that "Defendant has not filed a separate taxpayer 'suit.'" (Doc. 112 at 4.) But it determined that granting the motion "will preclude the IRS from using Defendant's Rule 36 Admissions in the § 6700 penalty examination" and thereby violate "the very purpose of the Anti-Injunction Act." (Doc. 112 at 5.)

Respectfully, this was the wrong approach. And it led the district court to an incorrect conclusion. The Eleventh Circuit has held that "in all cases involving statutory construction, [a court's] starting point must be the language employed by Congress, and [courts] assume that the legislative purpose is expressed by the ordinary meaning of the words

used." *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015) (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). "The first rule in statutory construction is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute." *Id.* "The 'plain' in 'plain meaning' requires [the court to] *look to the actual language used in the statute*." *Id.* (emphasis in original). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* at 488 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Here, the Anti-Injunction Act's plain language dictates that it applies only to "suits" brought "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). The Act does not bar Meyer's Motion because the Motion is simply not a "suit." Rather, it is a motion, brought in the context of the Government's injunction suit against Meyer. Further, the motion is not brought for the purpose of restraining assessment or collection of any tax. Rather, Meyer has made his Motion to enforce the district court's rules

pertaining to discovery obtained in that lawsuit and by which the Government must abide on the same terms as any other litigant.

Besides being mandated by this Court's binding precedent, this textual approach is especially wise where, as here, two different policies are implicated. Through the Anti-Injunction Act, Congress sought to further effective tax administration by limiting the avenues through which a taxpayer can challenge assessment or collection activity to those avenues that the tax code specifically prescribes.

But this purpose does not exist in a vacuum. Through other acts—like the Rules Enabling Act, 28 U.S.C. § 2072—Congress sought to give the Supreme Court broad authority to establish rules for litigation, including the use to which parties may put discovery. Further, by acquiescing to the Supreme Court's promulgation of the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act, Congress placed its imprimatur on Rule 36. The purpose behind Rule 36 is to streamline litigation. Rule 36(b)'s use limitation furthers that purpose by limiting the consequence of any Rule 36 Admission to the particular proceeding in which it is made. This encourages parties to use them, resulting in more efficient judicial administration. Congress balanced these

sometimes competing aims by limiting the Tax Anti-Injunction Act to "suits."

The district court may not ignore this limitation. Courts "are not at liberty to rewrite [a] statute to reflect a meaning [they] deem more desirable." *Wiersum*, 785 F.3d at 488. Rather, Courts "*must give effect to the text Congress enacted*." *Id.* (emphasis in original) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008)). "As the Supreme Court has instructed 'time and again,' courts presume Congress 'says in a statute what it means and means in a statute what it says there.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

These principles preclude the approach taken by the district court below. Accordingly, this Court should hold that the Tax Anti-Injunction Act does not bar Meyer's motion, reverse the district court's decision, and remand with instructions to consider the merits of Meyer's Motion for Protective Order.

B. Analogous caselaw supports Meyer's position.

No caselaw has directly addressed whether the Tax Anti-Injunction Act precludes a district court from considering a motion for protective order seeking to enforce limitations on the IRS's use of

discovery obtained in that litigation. But courts have considered analogous circumstances.

Specifically, in the proceedings below, Meyer directed the district court to *United States v. Mellon Bank, N.A.*, 521 F.2d 708 (3d Cir. 1975) and *United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977). In these cases, the Second and Third Circuits concluded that a taxpayer *could* seek injunctive relief as an intervenor in a suit brought by the United States, even if it would have the effect of restraining the assessment or collection of taxes. In doing so, the Second and Third Circuit relied upon the plain text of the Anti-Injunction Act and held that the intervenor's requested relief was not a "suit" to which the Act applied. A close examination of each case is appropriate.

In *Mellon Bank*, the United States brought an injunction action against a taxpayer's bank under 26 U.S.C. § 7402. 521 F.2d at 708. This is, incidentally, the same statute under which the United States proceeded against Meyer in the instant case. The United States sought access to a safe deposit box that the taxpayer held at the bank.

The taxpayer intervened and filed an "answer to the government's motion" in which he urged the court to prevent the Government from

accessing his safe deposit box. The district court denied the taxpayer relief. In doing so, the *Mellon Bank* district court reached the same conclusion as the district court in the instant appeal. The *Mellon Bank* district court held that the taxpayer's request was tantamount to an injunction and therefore barred by the Tax Anti-Injunction Act. 521 F. 2d at 708.

But the Third Circuit reversed. In doing so, the Third Circuit engaged in the kind of textual analysis of the Tax Anti-Injunction Act that Meyer now urges:

> The district court erred in concluding that it was without jurisdiction to consider [the taxpayer's] counterclaims on the basis of the Anti-Injunction Act. 26 U.S.C. § 7421 divests the district court of jurisdiction over any "suit for the purpose of restraining the assessment or collection of any tax." **[The taxpayer] did not sue to enjoin the assessment or collection of any tax. In fact he filed no suit at all**.

Mellon Bank, 521 F.2d at 711 (emphasis added). Of course, the same is true in Meyer's case. He has not sued to enjoin the assessment or collection of any tax. Rather, he has filed a Motion in the context of the United States' suit *against him*.

United States v. First Nat'l City Bank, 568 F.2d 853 (2d Cir. 1977) similarly supports Meyer's position. That case concerned facts virtually

identical to *Mellon Bank*. Indeed, the cases appear to concern two different safe deposit boxes owned by the same taxpayer. In *First National*, the Government likewise sued a bank under 26 U.S.C. § 7402 for access to the taxpayer's safe deposit box, and the owner sought to intervene.

On appeal, among the "essential questions presented" to the Second Circuit was "whether [the taxpayer] is barred by § 7421(a) (the Anti-Injunction Act) from raising his claims in the pre-seizure summary proceedings." *Id.* at 885. The Second Circuit held that the taxpayer was not so barred, against adopting precisely the sort of textual analysis that Meyer urges in this appeal:

> Before turning to [the taxpayer's] constitutional claims, we must determine whether he is barred by the Anti-Injunction Act from raising those claims in the instant proceedings. We hold that he is not.
>
> **Section 7421(a) has no application to counterclaims or defenses interposed by a taxpayer in an action brought by the government. By its terms, the statute applies only to "a suit for the purpose of restraining the assessment or collection of any tax," meaning of course a suit by the taxpayer.** It would seem fundamental that when Congress confers jurisdiction upon the district courts to entertain a government action to collect taxes, it may not bar a taxpayer from asserting in such action counterclaims or defenses which affect his rights with respect to the taxes sought.

First National, 568 F.2d at 856 (emphasis added). So, too, in Meyer's case it would seem fundamental that when Congress confers jurisdiction on the district courts to entertain the Government's injunction suits under § 7402, it does not bar a defendant from seeking to enforce limitations the courts rules place on the use of discovery gathered in that proceeding. This is precisely the relief that Meyer requests in his Motion. And, of course, the United States' injunction action is not a "suit by the taxpayer." *See First National*, 568 F.2d at 856.

Both *Mellon Bank* and *First National* appropriately adopt a textual approach to interpreting the Tax Anti-Injunction Act and apply the statute's plain language. The Eleventh Circuit, too, mandates this approach. *See Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015). As *Mellon Bank* and *First National* affirm, the Tax Anti-Injunction Act bars only suits brought by a taxpayer to restrain tax assessment and collection. It does not bar counterclaims or defenses raised in suits brought by the Government, or motions such as the one Meyer has made.

For this reason, this Court should hold that the Tax Anti-Injunction Act does not bar Meyer's Motion. It should reverse the district court's decision and remand with instructions to consider the merits of Meyer's Motion for Protective Order.

C. The caselaw relied upon by the district court does not support the district court's conclusion.

The district court relied upon four cases in determining that the Tax Anti-Injunction Act barred Meyer's Motion. The district court cited these cases as evidence of the Tax Anti-Injunction Act's purpose.

Specifically, the district court cited *Bob Jones University v. Simon*, 416 U.S. 725, 736 (1975) for the proposition that "[t]he Court has interpreted the principle purpose of the [Tax Anti-Injunction Act's] language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." (Doc. 112 at 5.) The district court cited language in *Gulden v. United States*, 287 F. App'x 813, 818 (11th Cir. 2008) to the effect that "[b]ecause the relief [plaintiff] requested would have restrained the IRS from eventually assessing or collecting his unpaid tax liability, his suit was barred by

the Anti-Injunction Act." (Doc. 112 at 5.) And the district court cited *Dickens v. United States*, 671 F.2d 969 (6th Cir. 1982) and quoted *Lowrie v. United States*, 824 F.2d 827, 830 (10th Cir. 1987) for the proposition that "[t]he [Anti-Injunction Act] applies not only to the actual assessment or collection of a tax but is equally applicable to activities leading up to, and culminating in, such assessment and collection." (Doc. 112 at 5.)

These propositions are correct, as far as they go. Meyer acknowledges that the policy behind the Tax Anti-Injunction Act is to further the Government's interest in effective tax collection, with "minimum" preenforcement judicial interference. But, as the Eleventh Circuit has recently observed, this underlying policy cannot expand the Tax Anti-Injunction Act beyond its plain text. *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015). And by its plain text, the Tax Anti-Injunction Act applies only to taxpayer suits. *United States v. Mellon Bank, N.A.*, 521 F.2d 708 (3d Cir. 1975); *United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977).

Importantly, none of the cases cited by the district court contradict this principle. *Bob Jones University*, *Gulden*, *Lowrie*, and *Dickens* all

applied the Tax Anti-Injunction Act to bar *suits brought by taxpayers*. None concerned cases like Meyer's, in which a defendant files a motion in an existing suit brought by the Government.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded to the trial court with instructions to consider the Merits of Meyer's Motion.

Date: September 24, 2021

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2. Typeface and Type-Style

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(s) /s/ Derick Vollrath

Attorney for Michael Meyer

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