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 REPLY 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: January 11, 2021

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In its Answering Brief, the Government does not contest that it is improper for the Internal Revenue Service to use Meyer's Rule 36 Admissions outside of the litigation in which Meyer made them. Nor could they. The Rule is quite direct: "An admission under [Rule 36] is not an admission for any other purpose and cannot be used against the party in any other proceeding."

Ordinarily, when a lawyer's client misuses discovery information in violation of a court's rules, the court can expect the lawyer to instruct his or her client to stop. Either that has not happened here, or the Internal Revenue Service has ignored the Justice Department's advice. Regardless, the Government now comes to this Court arguing not that the IRS has *followed* the applicable rules, but that the Court is simply powerless to enforce them.

But in this, the Government is wrong. A litigant is entitled to rely upon the protections that the Federal Rules of Civil Procedure offer. And a party can rely upon the Rules only if the Court can enforce them. Congress, in setting forth this Court's jurisdiction and in enacting the

Tax Anti-Injunction Act, 26 U.S.C. § 7421, did not intend to render Rule 36(b) a false promise of protection.

Meyer has made his argument on this point in his Opening Brief. This Reply, accordingly, will confine itself to addressing the three arguments that the Government makes in its Answering Brief.

A. That Meyer's case was closed does not divest the Court of jurisdiction to decide Meyer's Motion.

As its first point, the Government argues that "the District Court lacked jurisdiction to issue the protective order Meyer requested, because at the time Meyer filed his motion, the case was closed." (Answer Brief at 18.)

This was not an issue upon which the district court based its order denying Meyer relief. Rather, the district court based its decision upon the Tax Anti-Injunction Act. Accordingly, Meyer did not address this issue in his Opening Brief. Nevertheless, Meyer addresses the argument's substance here.

In making this argument, the Government relies upon *Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F. 3d 1258 (11th Cir 2021). The Government characterizes *Absolute Activist* thus:

> In *Absolute Activist*, however, this Court determined that, although the District Court retains the inherent authority to *enforce* a protective order entered while the case was pending as a collateral matter, 998 F.3d at 1268, it lacked jurisdiction to *modify* that order, *id.* at 1269. So too here, the District Court lacked jurisdiction to enter a new protective order under Rule 26(c), as sought by Meyer, because the underlying litigation is no longer pending.

(Answer Brief at 20 (emphasis in original).)

But the Government's reliance upon *Absolute Activist* is misplaced. *Absolute Activist* supports the district court's jurisdiction to decide Meyer's Motion. Contrary to the Government's contentions, Meyer's underlying Motion did ask the Court to impose a new limitation on the IRS's use of discovery information under Rule 26(c). Rather, Meyer sought enforcement of Rule 36(b)'s already extant and applicable limitation on the use to which the Government may put Meyer's Rule 36 Admissions.[1]

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[1] Notably, Meyer invoked not only Rule 26(c), but also "the inherent 'equitable powers of the courts of law over their own process, to prevent abuses, oppression, and injustices.'" (*See* Doc. 98 at 6 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984))). Meyer accordingly styled his Motion as a "Motion for Protective Order and Other Appropriate Relief," not merely a Motion for protective order under

(Footnote continued on next page . . .)

The Eleventh Circuit's *Absolute Activist* decision specifies that a district court retains jurisdiction to enforce such rules and limitations already in existence at the time a case is closed. *Absolute Activist* observed that the Supreme Court held in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) that even after voluntary dismissal, a district court retains jurisdiction to consider certain "collateral issues." The Supreme Court defined these "collateral issues" as "independent proceeding[s] supplemental to the original proceeding and not request[s] for modification of the original decree." *Absolute Activist*, 998 F.3d at 1265 (quoting *Cooter & Gell*, 496 U.S. at 395).

As examples of such "collateral issues," the Eleventh Circuit and the Supreme Court identified: "(1) the imposition of costs, (2) the imposition of attorney's fees, (3) the imposition of contempt sanctions, and (4) the imposition of Rule 11 sanctions." *Absolute Activist*, 998 F.3d at 1265 (citing *Cooter & Gell*, 496 U.S. at 395–96). The Supreme Court

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Rule 26(c) (Doc. 98). He specifically asked the Court to "enter an order prohibiting the IRS from using Meyer's Rule 36 Admissions made in this case against him for any other purpose." (*Id.* at 7.)

observed that the defining feature of these "collateral issues" is that they do "'not signify the district court's assessment of the legal merits of the complaint.'" *Id.*

Building upon the *Cooter & Gill*, the Eleventh Circuit in *Absolute Activist* observed that such motions are appropriate for post-dismissal adjudication because "[m]otions for costs, fees, and sanctions each implicate 'the power to enforce compliance with the rules and standards that keep the judiciary running smoothy.'" *Id.* at 1266 (quoting *Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020)).[2] Presciently, the Eleventh Circuit observed that "[i]f we divested the district court of jurisdiction over those motions, an enterprising [litigant] could abuse the judicial system but nevertheless get off scot free." *Id.* at 1266.

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[2] An observation may help to illustrate Meyer's argument. Meyer could have styled his Motion as one for sanctions against the Government for Rule 36(b)'s violation, rather than an order explicitly directing the government to comply with the Rule. However, Meyer's counsel assumed that the Government and the IRS would obey a clear and specific order directing it to comply with Rule 36(b) in this case, without the need for further sanctions, and did not seek to needlessly and vexatiously multiply the issues for decision. Should the Court deny Meyer relief for this reason, presumably there would be no impediment to Meyer *then* moving for sanctions for Rule 36(b)'s violation. The violation remains ongoing.

Indeed, the *Absolute Activist* court characterized as "obvious" that "district courts have the inherent power to impose sanctions for failure to apply with their orders," even after a case's closure. 998 F.3d at 1268 (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) for the proposition that sanctions pursuant to a court's inherent power are appropriate where an attorney advises a client to disregard a court order) and *In re Se. Banking Corp.*, 204 F.3d 1322, 1322 (11th Cir. 2000) for the proposition that contempt sanctions are appropriate in the face of a willful violation of an order's specific terms)).

Meyer's Motion presents precisely this kind of "collateral issue" over which a district court retains jurisdiction following closure pursuant to *Absolute Activist* and *Cooter & Gill*. A request for an order enforcing Rule 36(b)'s use-limitations certainly does not "signify the district court's assessment of the legal merits of the complaint." *See Absolute Activist*, 998 F.3d at 1265 (citing *Cooter & Gell*, 496 U.S. at 395–96). More importantly, Meyer's motion—which explicitly and unambiguously seeks to enforce compliance with Rule 36(b)—"implicate[s] 'the power to enforce compliance with the rules and

standards that keep the judiciary running smoothly.'" *Absolute Activist*, 998 F.3d at 1266 (quoting *Hyde*, 962 F.3d at 1309).

Accordingly, this Court should reject the Government's principal argument that the district court lacked jurisdiction to enforce Rule 36(b)'s use-limitation following the case's closure. This argument is foreclosed by *Absolute Activist*, the very case upon which the Government relies.

B. The Tax Anti-Injunction Act does not bar the district court from enforcing Rule 36(b).

As its second argument, the Government contends that the Tax Anti-Injunction Act bars Meyer's motion. According to the Government, it does not matter what the Rules of Civil Procedure state. The IRS may ignore them so long as the IRS does so in connection with making a tax assessment. Any effort to enforce the Rules in this context runs afoul of the Tax Anti-Injunction Act. [3]

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[3] The Government's position would, presumably, also extend to a court order. The Government's reasoning that the Anti-Injunction Act bars any prohibition on the use to which the IRS may put discovery information is equally applicable to both an order and a rule.

But Congress cannot have intended to undermine the Federal Rules of Civil Procedure and the courts' inherent ability to police discovery in this way. Indeed, according to the plain text of the Anti-Injunction Act, Congress did not do so.

As observed in Meyer's Opening Brief, the Act's plain text states only that "*[n]o suit* shall be maintained" for the purpose of restraining the assessment or collection" of a tax. This limited bar does not strip the courts of the power to police discovery and enforce the civil rules through motions made in suits that have been brought by the Government for other purposes.

Contrary to the Government's briefing, the Second and Third Circuits agree that the Anti-Injunction Act bars only suits that have been brought by a Taxpayer. The Second and Third Circuits reached this conclusion in *United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977) and *United States v. Mellon Bank, N.A.*, 521 F.2d 708 (3d Cir. 1975).

Relying on the text of the Act, the Third Circuit in *Mellon Bank* held that "the district court erred in concluding that it was without jurisdiction to consider [a Taxpayer's] counterclaims on the basis of the

Anti-Injunction Act." *Id.* at 711. The Third Circuit observed that "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'" but that "[the Plaintiff] did not sue to enjoin the assessment or collection of any tax." *Id.* "In fact he filed no suit at all." *Id.*

Similarly, the Second Circuit reasoned thus:

> Section 7421(a) has no application to counterclaims or defenses interposed by a taxpayer in an action brought by the government. By its terms, this statute applies only to a 'suit for the purpose of restraining the assessment or collection of any tax,' meaning of course a suit by a taxpayer.

First National, 568 F.2d at 856. In reaching this conclusion, the Second Circuit explicitly approved of the Third Circuit's decision in *Mellon Bank*. *See First National*, 528 F.2d at 857.

In its Answer Brief, the Government brushes *First National* and *Mellon Bank* aside arguing that "neither concerned a taxpayer's request for injunctive relief." (*See* Answer Brief at 38.) This assertion is remarkable. Presumably if that were the case, the Second and Third Circuits would have used it as a basis for their conclusion that the Anti-Injunction Act did not apply. But, instead, the Second and Third Circuits made no such observation.

Rather, the Second Circuit held that "[i]t 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 to be collected." *First National*, 568 F.2d at 856. The lynchpin of the Second Circuit's decision was that when the *government* brings a suit against a Taxpayer, it exposes itself to court orders concerning a Taxpayer's "rights with respect to the taxes sought to be collected," whether those orders are injunctive in nature or otherwise. *Id.*

Finally, in both *Mellon Bank* and *First National*, the relief that the Taxpayer sought was a court order that prevented the Government from seizing the contents of his safe-deposit box and applying it to a tax deficiency. This relief is every bit as "injunctive" as Meyer's request that the district court enforce Rule 36(b).

Against *Mellon Bank* and *First National*, the Government points to the Seventh Circuit's decision in *United States v. Dema*, 544 F.2d 1373 (7th Cir. 1976). In *Dema*, the IRS sued to enforce a summons under IRC §§ 7402(b) and 7604(a). The District Court enforced the

summons in part and rejected it in part, based upon the Government's representation that it only needed the Taxpayer's corporate records—not his personal records. *Id.* at 1375.

But, after the case was dismissed, the IRS issued a notice of deficiency to the individual Taxpayer. *Id.* The taxpayer then filed a motion in the district court seeking contempt sanctions. *Id.* Upon a showing that the IRS's actions "bordered on harassment," the district court entered "an order permanently restraining the IRS from issuing any subpoenas or requesting any books or records of the [individual Taxpayer], his wife, and [his company]" for certain years. *Id.*

The Seventh Circuit reversed over a dissent, holding that the Taxpayer's request that the IRS be restrained from investigating the Taxpayer for the subject years constituted "its own sub-action against appellant for injunctive relief, the potential result of which was in contravention of the spirit and purpose of [the Tax Anti-Injunction Act]." *Id.* at 1377.

The Seventh Circuit was impressed by the argument that *Dema* concerned a case initiated by the IRS, however. Accordingly, the

Seventh Circuit took care to limit its holding to "the circumstances of the present case."

Specifically, the Seventh Circuit observed—

> [T]he Court has noted with interest appellee's argument that there is a significant distinguishing feature between the instant case and those cited by appellant being the fact that the order appealed from herein resulted from the actions of the IRS itself and not from any suit brought by appellee to enjoin those actions. We fully appreciate appellee's contention in this respect. Nevertheless, *under the circumstances of the present case*, we decline to be persuaded thereby. Although we concede, as we must, that the appellee did not initiate proceedings against appellant in an attempt to enjoin the assessment or collection of taxes, it must be admitted that for all practical purposes appellee sought the identical result when he filed his motion for an order directing withdrawal of the notice of deficiency. The net result of appellee's motion, and the obvious intent thereof, was to restrain the IRS from pursuing any activities relating to the assessment and collection of taxes. Accordingly, it could reasonably be argued that appellee herein instituted his own sub-action against appellant for injunctive relief, the potential result of which was in contravention of *the spirit and purpose* of § 7421(a). *In such circumstances*, as we have stated above, we hold that it was improper for the district court to intervene and restrain appellant from pursuing its assessment procedures.

Id. at 1377 (emphasis added).

Meyer's case is different. He does not seek total restraint of the IRS from assessing the penalties it proposes. Rather, he seeks

enforcement of Rule 36(b)'s limitation on the IRS's abuse of discovery material obtained in this litigation. In this sense, Meyer's request is not "his own sub-action against appellant for injunctive relief." It is a natural corollary of the IRS's initiation of the suit: if the IRS sues in district court, it renders itself subject to enforcement of the district court's rules.

Dema is also suspect for another reason. *Dema* relies not on the Tax Anti-Injunction Act's text, but upon its "spirit and purpose." With due respect to the Seventh Circuit, the "spirit and purpose" of a law cannot expand the law's reach beyond its plain text. And the plain text of the Act confines the Act to *suits* brought to restrain the assessment of tax—not taxpayer motions in suits brought by the IRS.

Further, even if the Courts were to consider the "spirit and purpose" of the Tax Anti-Injunction Act controlling, it would not bar Meyer's Motion. Congress simply did not intend for the Tax Anti-Injunction Act to render the IRS effectively immune from a district court's rules covering litigation that the IRS itself starts. That was not the "spirit and purpose" behind the Act, and Meyer's motion does not thwart it.

For this reason, and the reasons articulated in Meyer's Opening Brief, the district court was wrong to hold that the Tax Anti-Injunction Act divested it of jurisdiction to consider Meyer's Motion. Accordingly, this Court should reverse the determination of the district court to that effect and remand for consideration of the merits of Meyer's Motion.

C. The District Court's order was not a valid exercise of discretion.

Finally, the Government argues that the district court did not abuse its discretion in denying Meyer's Motion. Essential to this argument, the Government posits that the court did not *really* hold that the Anti-Injunction Act barred it from considering the Motion at all. Rather, the Government argues that "the better view is that . . . the court made a prudential determination that Meyer's claims should be raised in a refund suit regarding penalties, and not in this closed injunction proceeding." (Answer Br. at 40.")

But the Government's tortured reading of the district court's order is wrong. As the Magistrate Judge observed in her Report and Recommendation, the Government explicitly argued before the district court that "*the Court lacks subject matter jurisdiction because the Anti-*

Injunction Act prohibits the relief requested, so the Motion should be denied." (Doc. 106 at 5 (emphasis added).)

The Magistrate Judge agreed. Accordingly, under a subheading of her Report and Recommendation that reads "The Anti-Injunction Act Precludes the Relief Requested in the Motion," the Magistrate Judge concluded "the relief requested in the Motion seeks to preclude the IRS from using certain information to assess a tax penalty *and is, therefore, impermissible under § 7421(a) [the Tax Anti-Injunction Act]*." (*Id.* at 5 (emphasis added)). Elsewhere, the Magistrate Judge stated that Meyer's argument that the district court could enforce Rule 36(b) "ignores the Anti-Injunction Act, *which applies to the relief sought in the Motion*." (*Id.* at 10 (emphasis added).) Magistrate Judge Valle recommended that the district court deny Meyer's Motion for this reason. (*Id.* at 11.)

The District Court adopted the Report and Recommendation without modification. (Doc. 112 at 7.) Indeed, the Court explicitly held that "the Court agrees with [the Magistrate Judge's] conclusion that Defendant's motion *is barred under the Anti-Injunction Act*." (*Id.* at 6.)

The Government's suggestion that "the better view [of the district court's order] is that . . . the court made a prudential determination" in the exercise of its discretion to decline jurisdiction[4] is just plain wrong. Rather, as Meyer has explained in this appeal, the district court incorrectly concluded that the Anti-Injunction Act barred the relief he sought. And of course, "a ruling based upon an error of law is an abuse of discretion." *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F. 3d 1251, 1257 (11th Cir. 2014) (citing *Young v. New Process Steel, LP*, 419 F.3d 1201, 1203 (11th Cir. 2005)).

CONCLUSION

For the foregoing reasons, and the reasons articulated in Meyer's Opening Brief, this Court should reverse the judgment of the district court and remand the case to the trial court with instructions to consider the merits of Meyer's motion.

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[4] Even if the district court had simply declined jurisdiction, this would likely constitute an abuse of discretion. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817(1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.")

Date: January 19, 2021

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(s)/s/ Derick Vollrath

Attorney for Appellant

Dated: 01/19/2022