20-12024-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL L. MEYER,

Defendant-Appellant

ON APPEAL FROM THE ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ANSWERING BRIEF FOR THE UNITED STATES

DAVID A. HUBBERT
Deputy Assistant Attorney General

FRANCESCA UGOLINI **(202) 514-3361**
JENNIFER RUBIN **(202) 307-0524**
BETHANY B. HAUSER **(202) 514-2830**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
JUAN ANTONIO GONZALEZ
United States Attorney

C-1 of 2

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, counsel for the appellant state that the following is a complete list of persons that having an interest in the outcome of the case or appeal:

Hon. Beth Bloom, United States District Judge

James Bresnahan II, counsel for the United States

Ariana Farajado Orshan, counsel for the United States

Juan Antonia Gonzalez, counsel for the United States

Grace Heritage Corporation

Benjamin G. Greenberg

Bethany B. Hauser, counsel for the United States

Indiana Endowment Fund, Inc.

Internal Revenue Service (IRS), agency of the United States

Michael L. Meyer, defendant-appellant

National Endowment Association, Inc.

Jeffrey Adam Neiman, attorney for the appellant

C-2 of 2

Harris J. Phillips, counsel for the United States

Jennifer Rubin, counsel for the United States

Emily M. Smachetti, counsel for the United States

Casey Smith, counsel for the United States

Francesca Ugolini, counsel for the United States

Hon. Alicia O. Valle, United States Magistrate Judge

Derick Roberson Vollrath, counsel for the appellant

United States of America, plaintiff-appellee

To the best of our knowledge, no publicly traded company has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the appellee respectfully inform this Court that because of the complexity of the issues presented, oral argument may be warranted.

TABLE OF CONTENTS

Page

Certificate of Interested Persons and

Corporate Disclosure Statement C-1

Statement regarding oral argument..... i

Table of contents..... ii

Table of citations iv

Statement of jurisdiction..... xiii

1. Jurisdiction in the District Court..... xiii

2. Jurisdiction in the Court of Appeals xiv

Statement of the issue 1

Statement of the case 2

(i) Course of proceedings and disposition in the court below 2

(ii) Statement of the facts..... 3

a. The underlying litigation 3

b. Meyer's motion for a protective order..... 5

c. The magistrate judge's report and recommendation 11

Page

d. The District Court's opinion 12

(iii) Statement of the standard or scope of review 14

Summary of argument 15

Argument 18

The District Court correctly denied Meyer's post-judgment motion for a protective order in this closed case 18

A. The District Court lacked the power to grant the new protective order Meyer sought in this closed case 18

1. The District Court had no power to issue a new protective order in a closed proceeding 19

2. Mandamus would not have been appropriate here 22

B. The Anti-Injunction Act bars the relief Meyer seeks 26

1. The Anti-Injunction Act channels tax disputes to Congressionally-authorized refund suits 26

Page(s)

2. The Anti-Injunction Act prevents premature challenges to evidence considered in IRS examinations 29

3. Meyer cannot avoid the Anti-Injunction Act by styling his request for injunctive relief as a motion in a closed case, rather than a new suit 34

C. At all events, the District Court did not abuse its discretion in denying Meyer's post-judgment motion 39

Conclusion 41

Certificate of compliance 42

TABLE OF CITATIONS

Cases:

* *Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258 (11th Cir. 2021) 16, 19-21

---

* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

Autrey v. United States,
889 F.2d 973 (11th Cir. 1989) 5

Blab T.V. of Mobile, Inc. v. Comcast Cable Commc'ns, Inc., 182 F.3d 851 (11th Cir. 1999) 14

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 27

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981) 24

Bostock v. Clayton Cty., Ga.,
140 S. Ct. 1731 (2020) 36

Bull v. United States,
295 U.S. 247 (1935) 27

Campbell v. Guetersloh,
287 F.2d 878 (5th Cir. 1961) 32-33

Cash v. Barnhart,
327 F.3d 1252 (11th Cir. 2003) 15, 23, 39, 41

---

* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

Chicago Trib. Co. v. Bridgestone/Firestone, Inc.,
263 F.3d 1304 (11th Cir. 2001) 14, 39

CIC Services v. Internal Revenue Serv.,
141 S. Ct. 1582 (2021) 13, 31-33

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 19-20

Dickens v. United States,
671 F.2d 969 (6th Cir. 1982) 23, 30-31

EEOC v. Nat'l Children's Ctr., Inc.,
146 F.3d 1042 (D.C. Cir. 1998) 20

F.T.C. v. St. Regis Paper Co.,
304 F.2d 731 (7th Cir. 1962) 8

Falsone v. United States,
205 F.2d 734 (5th Cir. 1953) 8, 24

Flora v. United States,
357 U.S. 63 (1958) 28-29

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* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

Gaetano v. United States,
942 F.3d 727 (6th Cir. 2019) 30

Gambale v. Deutsche Bank AG,
377 F.3d 133 (2d Cir. 2004) 20

U.S. ex rel. Girard Tr. Co. v. Helvering,
301 U.S. 540 (1937) 23

Green Sol. Retail, Inc. v. United States,
855 F.3d 1111 (10th Cir. 2017) 30

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) (*en banc*) 27

Hotze v. Burwell,
784 F.3d 984 (5th Cir. 2015) 27

* *Kemlon Prods. & Dev. Co. v. United States*,
638 F.2d 1315 (5th Cir. Mar. 1981),
modified, 646 F.2d 223 (5th Cir. May 1981) 30

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* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

Koin v. Coyle,

402 F.2d 468 (7th Cir. 1968) 30

LeBlanc v. Spector,

378 F. Supp. 310 (D. Conn. 1974) 9, 25

Lowrie v. United States,

824 F.2d 827 (10th Cir. 1987) 30

Murray's Lessee v. Hoboken Land & Improvement Co.,

59 U.S. (18 How.) 272 (1856) 28

Nat'l Fed'n of Indep. Bus. v. Sebelius,

567 U.S. 519 (2012) 26

Nevil v. Ford Motor Co., No. CV 294-015,

1999 WL 1338625 (S.D. Ga. Dec. 23, 1999) 22

Pansy v. Borough of Stroudsburg,

23 F.3d 772 (3d Cir. 1994) 20

Poliquin v. Garden Way, Inc.,

989 F.2d 527 (1st Cir. 1993) 21

---

* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

In re Rasbury,

24 F.3d 159 (11th Cir. 1994) 15

RYO Machine, LLC v. United States Dept. of Treasury,

696 F.3d 467 (6th Cir. 2012) 14

Seattle Times Co. v. Rhinehart,

467 U.S. 20 (1984) 21

United Nuclear Corp. v. Cranford Ins. Co.,

905 F.2d 1424 (10th Cir. 1990) 21

United States v. Clintwood Elkhorn Mining Co.,

553 U.S. 1 (2008) 28

* *United States v. Dema*,

544 F.2d 1373 (7th Cir. 1976) 30, 34-35, 40

United States v. Elmes,

532 F.3d 1138 (11th Cir. 2008) 14

United States v. First Nat'l City Bank,

568 F.2d 853 (2d Cir. 1977) 37-38

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* Cases or authorities chiefly relied upon have asterisks.

Cases (continued): **Page(s)**

United States v. Mellon Bank,

521 F.2d 708 (3d Cir. 1975) 37-38

Whitehurst v. Wal-Mart Stores East, L.P.,

No. 3:06-cv-191, 2007 WL 2993993

(M.D. Fla. Oct. 11, 2007) 21

Wiersum v. U.S. Bank, N.A.,

785 F.3d 483 (11th Cir. 2015) 36

Statutes:

* Anti-Injunction Act,

26 U.S.C. § 7421(a) ... xiii, 10-14, 16-17, 22, 26-27, 29-34, 36, 38-39

Internal Revenue Code (26 U.S.C.):

§ 6401 28

§ 6511 28

§ 6532 28

§ 6665 26

§ 6671 26

---

* Cases or authorities chiefly relied upon have asterisks.

Statutes (continued): **Page(s)**

Internal Revenue Code (26 U.S.C.) (cont'd):

§ 6700 ..... 5-9, 12-15, 18, 23-24, 26, 28-29, 33, 35

§ 6701 28

§ 6702 28

* § 6703 ..... 24-25, 28-29, 40

§ 7402 xiii

§ 7407 ..... xiii, 3

§ 7408 ..... xiii, 3, 5

* § 7421(a) ..... ix, 10-14, 16-17, 22, 26-27, 29-36, 38-39

§ 7422(a) 28

28 U.S.C.:

§ 1291 x

§ 1340 xiii

§ 1345 ix

§ 1346(a)(1) 28

§ 1361 15

---

* Cases or authorities chiefly relied upon have asterisks.

Statutes (continued): **Page(s)**

§ 1651 22

§ 2201 (Declaratory Judgment Act) 27

Act of Mar. 2, 1867, Chapter 169 § 10, 14 Stat. 468 36

Miscellaneous:

Fed. R. App. P. 4(a)(1)(B)(i) x

Fed. R. Civ. P.:

Rule 11 20

Rule 16 8

Rule 26 ..... 10, 16, 19, 21

Rule 36 ..... xiii, 1-2, 4, 6, 8-9, 13, 18, 23, 25, 40

Rule 41 19-20

Rule 81 8

Injunctions, 78 HARV. L. REV. 994 (1965) 37

---

* Cases or authorities chiefly relied upon have asterisks.

STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

In April 2018, the United States initiated suit in the District Court, seeking to permanently enjoin defendant Michael Meyer from preparing false returns and taking other actions in connection with the promotion of a fraudulent tax scheme. (Doc. 1.) The District Court, which had jurisdiction under 28 U.S.C. §§ 1340 and 1345, and Internal Revenue Code (I.R.C.) §§ 7402(a), 7407, and 7408 (26 U.S.C), entered a permanent injunction against Meyer on April 26, 2019. (Doc. 97.) Meyer waived all right to appeal from that judgment. (Doc. 97 at 7.)

More than 18 months after entry of that judgment, on November 20, 2020, Meyer filed a motion seeking a protective order "prohibiting the Government . . . from improperly using Defendant's Rule 36 Admissions . . . in a separate IRS penalty examination." (Doc. 98 at 1, footnote omitted.) On June 14, 2021, the District Court held that Meyer's requested relief "is barred under the Anti-Injunction Act," I.R.C. § 7421(a), and denied the motion. (Doc. 112 at 6-7; *see also* Doc. 106 (report and recommendation).) As explained in the Argument, *infra*, the District Court lacked subject-matter jurisdiction to enter the

protective order sought by Meyer. The order denying Meyer's motion resolved all claims of all parties.

2. Jurisdiction in the Court of Appeals

Meyer appealed the District Court's order the same day it was entered. (Doc. 112, 113.) The appeal was timely with respect to the order denying Meyer's post-judgment motion under Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291.

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Plaintiff-Appellee

v.

MICHAEL L. MEYER,

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ON APPEAL FROM THE ORDER
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ANSWERING BRIEF FOR THE UNITED STATES

STATEMENT OF THE ISSUE

During proceedings brought by the Government seeking an injunction barring Michael Meyer from promoting abusive tax shelters, Meyer made admissions pursuant to Fed. R. Civ. P. 36. Long after the District Court entered judgment in the injunction proceedings, Meyer filed a motion in the closed case, requesting a protective order to prevent the IRS from relying on his admissions in a separate

administrative examination to determine potential penalties against him for promoting abusive tax schemes. Meyer's appeal of the District Court's order denying that post-judgment motion raises one issue:

Whether the District Court lacked jurisdiction to grant a post-judgment motion seeking to prevent the IRS from using admissions made in closed injunction proceedings to determine potential penalties against Meyer—or at least did not abuse its discretion in denying that motion.

STATEMENT OF THE CASE

(i) Course of proceedings and disposition in the court below

On April 26, 2019, the District Court permanently enjoined Meyer from promoting a fraudulent tax scheme. (Doc. 97.) Neither party took an appeal. More than 18 months later, on November 20, 2020, Meyer moved the District Court for a protective order prohibiting the IRS, in a separate examination determining tax penalties as to Meyer, from relying on Fed. R. Civ. P. 36 admissions made by him in this proceeding. (Doc. 98.) The United States opposed the motion (Doc. 104), and Meyer replied (Doc. 105).

The motion was referred to a magistrate judge (Doc. 102) who recommended that it be denied (Doc. 106). Despite Meyer's objections (Doc. 107), the District Court adopted the magistrate judge's recommendation and denied the motion. (Doc. 112.) Meyer brought this appeal. (Doc. 113.)

(ii) Statement of the facts

a. The underlying litigation

Pursuant to his duty to enforce the internal revenue laws, the Secretary of the Treasury may request, and the United States may seek in the appropriate district court, an order permanently enjoining any person from engaging in certain conduct identified by Congress, including misrepresenting the law to taxpayers and promoting fraudulent tax-evasion schemes. I.R.C. §§ 7407, 7408. The United States brought such a suit against defendant Meyer. (Doc. 1.)

In the tax-evasion scheme Meyer promoted, known as the "Ultimate Tax Plan" or "Charitable LLC," individuals would "create an Entity; transfer property to that Entity; assign, donate, contribute, or transfer an ownership interest in that Entity to a tax-exempt entity"; and then "claim a charitable contribution tax deduction based on that

assignment, donation, contribution, or transfer of the Entity" and "allocate income from the Entity to the tax-exempt entity." (Doc. 97 at 1-2.) Marketing materials for this scheme falsely claimed that participants (and their heirs) could retain control and use of these purportedly donated assets and still receive those tax benefits. (Doc. 61-1, 61-2, 61-3.) Meyer authenticated these marketing materials—that is, he admitted that he created the materials and used them in marketing the scheme—in response to requests for admissions under Fed. R. Civ. P. 36. (Doc. 61-5 at ¶¶ 7-9, 42-48, 53-54, 68, 79-81; Doc. 61-6 at ¶¶ 7-9, 42-48, 53-54, 68, 79-81.)

After discovery, Meyer and the United States filed a joint motion for a permanent injunction. (Doc. 95.) The District Court granted that motion and entered judgment for the United States, permanently enjoining Meyer from, *inter alia*, "directly or indirectly . . . [o]rganizing, (or assisting in the organization of), promoting, marketing, or selling the Ultimate Tax Plan or any plan or arrangement that is substantially similar, or participating (directly or indirectly) in the sale of any

interest in the Ultimate Tax Plan or any plan or arrangement that is substantially similar." (Doc. 97 at 2.)

The injunction also required Meyer to turn over to the IRS information regarding this scheme, including the names of participants, and to inform participants of the court's order. (Doc. 97 at 3-5.) The order provided that the "United States is permitted to engage in post-judgment discovery to ensure and monitor compliance with the final judgment of permanent injunction in this case," and that the District Court would "retain jurisdiction over this action for the purpose of implementing and enforcing the final judgment and permanent injunction in this case." (Doc. 97 at 6.)

b. Meyer's motion for a protective order

Under I.R.C. § 7408(c)(1), an injunction, such as the one imposed by the District Court here, may be granted based on, *inter alia*, behavior that is subject to penalty under I.R.C. § 6700. Section 6700 imposes civil penalties on individuals who promote abusive tax shelters. *See generally Autrey v. United States*, 889 F.2d 973, 979 (11th Cir. 1989) (discussing a prior version of the statute). The penalty generally equals $1,000 for each violation, or, in cases of certain egregious conduct, 50

percent of the gross income derived by the individual from promoting abusive schemes. *See* I.R.C. § 6700(a)(2).

On November 20, 2020—eighteen months after he was permanently enjoined from promoting abusive tax schemes—Meyer filed a motion for a protective order in this proceeding, contending that, after the entry of the injunction in this case, the IRS was improperly using his Rule 36 admissions in an examination of his liability for civil penalties under I.R.C. § 6700. (Doc. 98 at 3-4.)

As part of that examination, in July 2020, the IRS sent to Meyer a revenue agent report proposing that civil penalties be assessed under I.R.C. § 6700. (Doc. 98 at 4.) Although that report itself is not in the record, it appears that the revenue agent concluded, in part, and partially based on Meyer's admissions in the injunction proceedings: that Meyer had misrepresented his credentials; that he knew he had not created Donor Advised Funds for his clients; that he advised participants to improperly deduct pledges to pay; and that his "illegal tax scheme promoted form over substance." (Doc. 98-1 at 1.)

Based on these and other conclusions, the revenue agent recommended that § 6700 penalties be assessed for tax years 2005 to 2018, as follows:

Year	Proposed penalty
2005	$119,175
2006	$136,581
2007	$66,225
2008	$171,300
2009	$145,700
2010	$379,945
2011	$123,765
2012	$647,225
2013	$743,788
2014	$475,768
2015	$1,448,388
2016	$1,413,398
2017	$1,071,657
2018	$123,125

(Doc. 98-2 at 14.) The sum of these proposed penalties is $7,066,039. (Doc. 98 at 4.)[1]

Meyer responded to the revenue agent's recommendation on September 8, 2020. (Doc. 98-1.) In his letter, Meyer claimed that the revenue agent's reliance on his responses to requests for admissions

[1] The $1 discrepancy between this figure and the sum of the proposed assessments in the IRS's letter is presumably due to rounding.

from the injunction proceedings violated Fed. R. Civ. P. 36(b).[2] (Doc. 98-1 at 1.) Meyer asked the IRS to "redetermine its § 6700 penalty case against Meyer without improperly using Meyer's Admissions or Answer in the civil injunction suit." (Doc. 98-1 at 2.) "If the IRS cannot agree to this relief," Meyer stated, he "will be forced to seek redress from the Courts." (Doc. 98-1 at 2.)

The IRS responded by letter of October 20, 2020. (Doc. 98-2.) Citing Fed. R. Civ. P. 81 and decisions from the Fifth and Seventh Circuits, that letter explained that the Federal Rules of Civil Procedure "are not applicable to administrative determinations made by the Internal Revenue Service." (Doc. 98-2 at 14; *see also* Doc. 98-2 at 15, citing *Falsone v. United States*, 205 F.2d 734, 742 (5th Cir. 1953); *F.T.C.*

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[2] Rule 36(b), entitled "Effect of an Admission; Withdrawing or Amending It," states: "A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."

v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962).) The letter also relied on *LeBlanc v. Spector*, 378 F. Supp. 310, 315 (D. Conn. 1974), in which the court permitted the defendant in a civil case to invoke the Fifth Amendment to avoid responding to Rule 36 requests for admission, on the ground that a prosecutor could rely on the fact of such admissions in deciding to prosecute, even though he would not be able to rely on the admissions themselves in the eventual criminal trial. The IRS's letter concluded "we have determined that the [§ 6700] penalties . . . apply." (Doc. 98-2 at 15.) It instructed Meyer to submit a written rebuttal to the penalty report, if any, by October 30, 2020. (Doc. 98-2 at 15.)

Meyer did not respond to that letter. Instead, on November 20, 2020, he moved the District Court for a new protective order "preventing the Government and its client, the IRS, from using Meyer's Rule 36 Admissions to support factual conclusions in the IRS's Section 6700 Penalty examination." (Doc. 98 at 5.) Meyer asserted that the District Court had the power to enter such a protective order in a closed

case under its "inherent power" and Fed. R. Civ. P. 26(c). (Doc. 98 at 5.)[3]

The United States opposed the motion, contending that the requested relief was barred by the Anti-Injunction Act, I.R.C. § 7421(a), which provides (with exceptions not applicable here) that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." (Doc. 104 at 1.) On the merits, the government argued that the Federal Rules of Civil Procedure do not apply in an IRS examination. (Doc. 104 at 15-16.) In reply, Meyer argued that the Anti-Injunction Act "simply does not apply to this case," because it applies only to "*suits* that are brought for the purpose of restraining the assessment of a tax," not to a *motion* filed in a closed case, for the same purpose, seeking the same result. (Doc. 105 at 7.)

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[3] In his motion, Meyer appeared to abandon his complaint about the revenue agent's reliance on his answer. (*Compare* Doc. 98 to Doc. 98-1 at 2.) He has not sought to revive this argument.

c. The magistrate judge's report and recommendation

The motion was referred to Magistrate Judge Alicia O. Valle, who recommended that it be denied. (Doc. 106 at 1.) The magistrate judge acknowledged Meyer's argument 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," but noted that Meyer has cited "no legal support for that conclusion." (Doc. 106 at 6.) The magistrate judge then recommended that "[i]n the absence of case law supporting [his] interpretation . . . the relief requested in the Motion violates the policy behind the Anti-Injunction Act and should be denied." (Doc. 106 at 6.)

In support of this conclusion, the magistrate judge observed that the "IRS penalty examination is an entirely separate matter from the instant civil case, which was settled" before Meyer moved for a protective order. (Doc. 6 at 6.) The magistrate judge cited a number of appellate cases holding that the Anti-Injunction Act barred courts from reviewing the evidence relied upon by the IRS in examinations. (Doc. 106 at 7.) A "protective order in this case," the magistrate judge

observed, "would have the same effect as an injunction" in one of those cases, because it "would preclude the IRS's assessment of penalties." (Doc. 106 at 7.)

The magistrate judge also noted that, because the relief requested was barred by the Anti-Injunction Act, it was not necessary to decide whether the IRS's use of the admissions in the § 6700 penalty examination was proper. (Doc. 106 at 9.) Finally, the magistrate judge observed that Meyer had an adequate remedy at law because "following the assessment and collection" of penalties, he "may bring a refund suit in a federal district court or in the Court of Claims." (Doc. 106 at 10.)

d. The District Court's opinion

Meyer objected to the magistrate judge's recommendation. (Doc. 107.) The District Court (Judge Beth Bloom) characterized the objections as "improper because they largely expand upon and reframe the arguments already made and considered by Judge Valle, or simple disagree with the Report's conclusions." (Doc. 112 at 4.) Nevertheless, the District Court considered the matter *de novo*, overruled the objections, adopted the magistrate's report, and denied the motion for a protective order. (Doc. 112 at 1, 7.)

On the merits, the District Court recognized that Meyer had "styl[ed] his request" for an injunction as a "motion" rather than a "suit." (Doc. 112 at 5.) But, the court observed, "granting the instant Motion will preclude the IRS from using Defendant's Rule 36 Admissions in the § 6700 penalty examination." (Doc. 112 at 4.) Thus, the court held, "the relief requested will directly affect the IRS's assessment of penalties and violate the very purpose of the Anti-Injunction Act." (Doc. 112 at 5.) Moreover, the court noted, Meyer filed his motion not as part of an active dispute, but "in a closed case where his § 6700 penalty liability was never at issue." (Doc. 112 at 5.) The court declined to allow Meyer to "circumvent the Anti-Injunction Act's jurisdictional bar" in this manner. (Doc. 112 at 5.)

The District Court also rejected Meyer's reliance on the Supreme Court's decision in *CIC Services v. Internal Revenue Serv.*, 141 S. Ct. 1582 (2021). The challenge in *CIC Services*, the court noted, was to a reporting requirement, whereas the question Meyer sought to raise here, *viz.*, what "information the IRS may consider in its assessment of

. . . tax penalties under § 6700," "falls squarely within the contours of the Anti-Injunction Act." (Doc. 112 at 6.)

Finally, the District Court highlighted that Meyer could bring a refund suit in federal district court or the Court of Federal Claims after the penalty was assessed and paid. (Doc. 112 at 7.) Meyer brought this appeal. (Doc. 113.)

(iii) Statement of the standard or scope of review

Whether a federal court possesses jurisdiction is a question of law reviewed *de novo*. *Blab T.V. of Mobile, Inc. v. Comcast Cable Commc'ns, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999). An argument that the court lacks jurisdiction may be raised at any time during the proceedings. *Id.* Whether the Anti-Injunction Act deprived the District Court of subject matter jurisdiction presents a question of law, reviewable *de novo*. *See RYO Machine, LLC v. United States Dept. of Treasury*, 696 F.3d 467, 471 (6th Cir. 2012). This Court may "affirm the district court's decision on any ground that is supported by the record." *United States v. Elmes,* 532 F.3d 1138, 1142 (11th Cir. 2008) (citation omitted).

Even if jurisdiction exists, a district court's denial of a protective order is reviewed for abuse of discretion. *Chicago Trib. Co. v.*

Bridgestone/Firestone, Inc., 263 F.3d 1304, 1309 (11th Cir. 2001). Were Meyer's motion to be construed as a petition for a writ of mandamus to the IRS under 28 U.S.C. § 1361, the denial of a writ of mandamus would also be reviewed for abuse of discretion. *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003). The abuse-of-discretion standard allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994) (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

In 2020, toward the end of an IRS examination, the IRS sent Michael Meyer a notice indicating that it proposed assessing approximately $7 million in penalties pursuant to I.R.C. § 6700 for his promotion of an abusive tax shelter over a 14-year period. As part of the examination, the IRS relied on admissions Meyer had made in a closed District Court proceeding in which he was enjoined from promoting the abusive tax shelter. In response, Meyer filed a post-judgment motion in that closed proceeding, seeking a protective order

barring the IRS from relying on the admissions to determine his liability for penalties. The District Court correctly denied his motion.

1. As an initial matter, the district court lacks authority under Fed. R. Civ. P. 26(c) to enter a protective order in a closed case. Rule 26(c)(1) states that a "party or any person from whom discovery is sought may move for a protective order in the court where the action *is pending*." *Id.* (emphasis added). Here, Meyer sought a protective order for the first time 18 months after the case was closed. This Court's recent decision in *Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258, 1266 (11th Cir. 2021), confirms the district court's lack of authority here. There, this Court held that a district court lacked jurisdiction, after the case was terminated, to modify a protective order entered when the case was pending. There is thus no basis for holding that a district court can enter a protective order under Fed. R. Civ. P. 26(c) in the first instance long after the case has closed.

2. Had he brought *suit* seeking an injunction, Meyer acknowledges that the suit would be barred by the Anti-Injunction Act, I.R.C. § 7421(a). The Anti-Injunction Act generally bars suits to enjoin

the assessment or collection of tax, including suits that seek to enjoin the acts leading up to the assessment of tax. As pertinent here, this includes challenges to the evidence used by the IRS in examinations to determine the amount of tax or penalties to be assessed.

Meyer argues that he has found a loophole to the Anti-Injunction Act, by filing a *motion* in this long-closed district court case seeking a protective order against the IRS's use of his admissions in its separate penalty examination. No such loophole exists, as the Seventh Circuit long ago observed. Indeed, as the District Court held, the type of relief Meyer seeks here is just the type of relief that the Anti-Injunction Act bars.

3. At all events, the District Court did not abuse its discretion in refusing to endorse Meyer's effort to circumvent the Anti-Injunction Act, especially because the order he requested would undermine the Act's purpose and policy. Moreover, after assessment of the penalties, Meyer will be able to file a tax refund case. In such a refund case, the IRS will not be able to rely on Meyer's admissions from the injunction

litigation to satisfy its burden of proof, and Meyer can raise any challenges to the IRS's use of his admissions in that forum.

ARGUMENT

The District Court correctly denied Meyer's post-judgment motion for a protective order in this closed case

A. The District Court lacked the power to grant the new protective order Meyer sought in this closed case

As a preliminary matter, the District Court lacked jurisdiction to issue the protective order Meyer requested, because at the time Meyer filed his motion, the case was closed. (Doc. 97; *see* Doc. 112 (declining to grant the relief requested "in a closed case").)[4] In the jurisdictional statement of his brief on appeal, Meyer asserts that he is seeking a

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[4] To be sure, the stipulated judgment provided that the District Court retained "jurisdiction over this action for the purpose of implementing and enforcing the final judgment and permanent injunction in this case." (Doc. 97 at 6.) Meyer mentions this provision in his statement of jurisdiction (Br. 1), but he does not contend that the rule of procedure he wants enforced, Rule 36(b), is part of "the final judgment and permanent injunction." Nor could he reasonably do so, as the plain terms of the rule is quite limited. The rule is not a roving commission for the court to sit in review of all subsequent interactions between Meyer and the government. As the District Court noted in its order, in the original case the "§ 6700 penalty liability was never at issue." (Doc. 112 at 5.)

"post-judgment motion for [a] protective order" (Br. 1); in his motion, he claimed that the court could grant this relief "pursuant to its inherent powers and Rule 26(c)" (Doc. 98 at 5).

1. The District Court had no power to issue a new protective order in a closed proceeding

A district court has no power to issue *new* protective orders under Fed. R. Civ. P. 26 once a case is no longer pending. As Rule 26(c)(1) says: a "party or any person from whom discovery is sought may move for a protective order in the court where the action *is pending*." *Id.* (emphasis added).

This Court has recently confirmed that straightforward interpretation of Rule 26. *Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258, 1266 (11th Cir. 2021), *pet. for cert. docketed,* No. 21-622 (S. Ct. Oct. 28, 2021). In *Absolute Activist*, after the District Court entered a joint stipulated protective discovery order, the plaintiffs voluntarily withdrew the case under Rule 41(a). *Id.* at 1263. A dismissal under Rule 41(a) deprives a court of jurisdiction over the action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Absolute Activist*, 998 F.3d at 1265. Even after a district court has lost

jurisdiction, however (whether through a Rule 41(a) withdrawal or otherwise), it generally retains jurisdiction to adjudicate "collateral issues" such as costs and Rule 11 sanctions. *Cooter & Gell*, 496 U.S. at 395; *Absolute Activist*, 998 F.3d at 1266. And a "court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell*, 496 U.S. at 396.

In *Absolute Activist*, however, this Court determined that, although the District Court retained 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.[5] So too here, the District Court lacked jurisdiction to enter a

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[5] The dissent in *Absolute Activist* characterized several cases from other circuits as permitting modification of a protective order after the underlying case was final. 998 F.3d at 1271 (Grant, J., diss.). But each of those cases involved a motion to relax or terminate a protective order entered during the initial litigation, not the extension of such an order or, what Meyer seeks here, the entry of an entirely new protective order. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139-42 (2d Cir. 2004); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir.
(continued…)

new protective order under Rule 26(c), as sought by Meyer, because the underlying litigation was no longer pending.

In the District Court, Meyer relied on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Whitehurst v. Wal-Mart Stores East, L.P.*, No. 3:06-cv-191, 2007 WL 2993993 (M.D. Fla. Oct. 11, 2007). (*See* Doc. 106 at 10.) Meyer mentions these cases in his recitation of the history of this case (Br. 6-7), but does not rely upon them in his argument. At all events, as the magistrate judge observed (Doc. 106 at 110), the relief granted in those cases is distinguishable from the relief requested by Meyer. Both cases concerned the enforcement of protective orders entered while the underlying litigation was pending. *Seattle Times*, 467 U.S. at 27-28; *Whitehurst*, 2007 WL 2993993, at *1.[6]

1994); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

[6] It is not clear whether the court in *Whitehurst* modified a protective order after the case had been resolved or merely clarified an ambiguous statement for the benefit of a *pro se* litigant. *See id.*, 2007 WL 2993993, at *2. Regardless, to the extent it modified the protective order, the unpublished district court opinion in *Whitehurst* is entitled to no weight in light of this Court's decision in *Absolute Activist*.

Meyer also mentions (Br. 7) a second unpublished district court order, *Nevil v. Ford Motor Co.*, No. CV 294-015, 1999 WL 1338625 (S.D. Ga. Dec. 23, 1999). But the district court in *Nevil* neither issued nor modified the protective order that had been issued during discovery; it imposed sanctions upon a party who had violated it. 1999 WL 13386225, at *2. Here, however, Meyer has not sought sanctions, nor a finding of contempt.

In short, the District Court lacked the power to provide the type of relief Meyer sought in his motion and continues to seek on appeal: a new protective order in a closed case. For that reason alone, the District Court's order denying the motion should be affirmed.

2. Mandamus would not have been appropriate here

In the District Court, Meyer also invoked the court's general mandamus jurisdiction (Doc. 105 at 6, citing 28 U.S.C. § 1651), and its "inherent powers" (Doc. 98 at 5). He appears to have abandoned any reliance on mandamus jurisdiction or inherent powers in his brief on appeal, perhaps because the Anti-Injunction Act is widely understood to

bar mandamus actions. *E.g.*, *Dickens v. United States*, 671 F.2d 969, 972 (6th Cir. 1982).

Regardless, mandamus is not an appropriate form of relief here. "Mandamus relief is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available." *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003) (internal quotation and alterations omitted). As discussed *infra*, Meyer may contest any penalty assessed by the IRS under I.R.C. § 6700 in a district court refund suit. Where the taxpayer may yet bring such a refund suit, "mandamus is not an appropriate remedy." *U.S. ex rel. Girard Tr. Co. v. Helvering*, 301 U.S. 540, 543 (1937).

Furthermore, Meyer has no "clear right" to the relief requested, and the IRS has no "clear duty" to act, *see Cash*, *supra*, at 1258, because it was not improper for the IRS revenue agent to consider, in the administrative § 6700 penalty examination, the admissions Meyer made in this civil proceeding. Federal Rule of Civil Procedure 36(b) states, in pertinent part, that a "matter admitted under this rule is

conclusively established," but also 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." As all parties agree, the IRS penalty examination is not generally subject to the Federal Rules of Civil Procedure. (*See* Br. 6.) In particular, as the Fifth Circuit held in 1953, the rules governing the admissibility of evidence in a judicial proceeding do not govern an IRS examination. *Falsone v. United States*, 205 F.2d 734, 742 (5th Cir. 1953).[7]

Moreover, such an audit is an examination by an IRS revenue agent, not an adversarial "proceeding" in which the government, as well as the taxpayer, is represented before a neutral arbiter. And the result of the examination—a possible penalty assessment under I.R.C. § 6700—is not "conclusive," but is subject to *de novo* judicial review in a refund suit in which the government will bear the burden of proof. *See* I.R.C. § 6703(a). In such a refund suit, of course, the Federal Rules of

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Civil Procedure *will* apply, and the government will not be able to rely upon admissions made in this case.

The examining agent's report was therefore, as the IRS explained in its letter, a "predecisional action[ ]" (Doc. 98-2 at 14). By citing the admissions in her report, the IRS revenue agent therefore neither treated the admissions *as admissions* (that is, she did not treat them as "conclusively established"), nor did she use the admissions "against" Meyer in a "proceeding." *See* Rule 36(b). Instead, the revenue agent, advising her superior and with an eye to the anticipated refund suit, indicated that there was good reason to believe the government would be able to establish these same facts in another civil proceeding that, like this one, is subject to the Federal Rules of Civil Procedure, and where, as here, the government bears the burden of proof. *See* I.R.C. § 6703(a). That is why, in replying to Meyer in the fall of 2020, the IRS relied (Doc. 98-2 at 15) on a district court case, *LeBlanc v. Spector*, 378 F. Supp. 310, 315 (D. Conn. 1974), pointing out that a criminal prosecutor might use admissions in a similar manner: not to "conclusively establish[ ]" a fact that the government must prove in a

subsequent district court proceeding, but to aid in the administrative decision whether to test the government's position in such a proceeding. In short, the relevant caselaw supports the IRS's position that it could permissibly rely on the admissions from the injunction litigation in its promoter penalty examination. As such, Meyer cannot establish that he has a clear right to mandamus relief against the IRS's actions here.

B. The Anti-Injunction Act bars the relief Meyer seeks

1. The Anti-Injunction Act channels tax disputes to Congressionally-authorized refund suits

Regardless of whether the District Court otherwise had authority to issue a new protective order in a closed case, the court properly concluded that the relief Meyer sought here was barred by the Anti-Injunction Act. (Doc. 106 at 7; Doc. 112 at 5.) The Anti-Injunction Act, codified at I.R.C. § 7421(a), generally provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." For purposes of the Internal Revenue Code, including the Anti-Injunction Act, § 6700 penalties are defined as "taxes." I.R.C. §§ 6665, 6671. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Congress can, of course, describe

something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act."). The Anti-Injunction Act has been described as "strip[ping] federal courts of jurisdiction" where it otherwise exists. *Hotze v. Burwell*, 784 F.3d 984, 988 (5th Cir. 2015). *See also Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974). *But see Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1159 (10th Cir. 2013) (*en banc*) (Gorsuch, J., concurring) (arguing that the Anti-Injunction Act is not jurisdictional).[8]

The Anti-Injunction Act channels tax disputes into congressionally approved avenues, principally a refund suit. This codifies the ancient practice, at common law, of permitting the government to collect taxes by summary administrative proceedings, granting taxpayers the right to dispute those taxes only by paying the tax and suing for a refund. *See Bull v. United States*, 295 U.S. 247, 259 (1935) (this practice dates

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[8] The tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, is "at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 732 n.7. The statutes have been described by some courts as "coterminous." *Id.* Here, as in *Bob Jones*, because the relief sought is barred by the Anti-Injunction Act, "there is no occasion to resolve whether the [DJA] is even more preclusive." *See id.*

to "[t]ime out of mind"); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277-78 (1856) (tracing the practice through the States under the Articles of Confederation to English law).

To bring such a refund suit, a taxpayer generally must pay the assessed tax in full, *Flora v. United States*, 357 U.S. 63, 64-75 (1958), then request a refund from the IRS, I.R.C. §§ 6401(a), 6511. If the refund is denied, the taxpayer may then bring suit in district court (or the Court of Federal Claims) to recover sums "alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. § 1346(a)(1); *see* I.R.C. §§ 6532, 7422(a); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008).

Congress has, however, enacted a special system for judicial review of penalties assessed under I.R.C. §§ 6700, 6701, and 6702. Instead of paying the penalties in full, the taxpayer has 30 days from the assessment (less time than usual) to pay 15 percent of the penalties (a smaller portion than usual) and file an administrative claim for refund. I.R.C. § 6703(c)(1). If a timely administrative refund claim is

denied or not acted upon for six months, the taxpayer has 30 days (a shorter period than usual) to sue for a refund in federal district court. I.R.C. § 6703(c)(2).

Tax penalties under I.R.C. § 6703 are "divisible" by tax period. *Cf. Flora*, 362 U.S. at 175. Thus, to challenge the conclusions of the IRS's examination in a refund suit, a taxpayer need only pay 15 percent of the tax assessed for one tax year. If the IRS were to assess § 6700 penalties in the amounts proposed in the agent's report, therefore, Meyer would need to pay 15 percent of the smallest assessment—that is, 15 percent of the $66,225 penalty proposed for 2007, or as little under $10,000—to initiate the I.R.C. § 6703 refund procedure.[9]

2. The Anti-Injunction Act prevents premature challenges to evidence considered in IRS examinations

Over the decades, many taxpayers have sought to circumvent this historic pattern of summary administrative assessment, followed by *de novo* judicial review in a refund suit, by seeking interlocutory rulings

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[9] Notably, collection is stayed only with respect to those tax periods for which taxpayer has sought a refund. I.R.C. § 6703(c).

regarding what evidence may be considered by IRS examiners. The courts have consistently barred their efforts, holding that the Anti-Injunction Act "'is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes.'" *Kemlon Prods. & Dev. Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. Mar. 1981), *modified in other part*, 646 F.2d 223 (5th Cir. May 1981) (quoting *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976)).

The rule applies to pre-assessment disputes regarding a wide variety of contested evidence considered by IRS examiners. *See e.g.*, *Gaetano v. United States*, 942 F.3d 727, 733 (6th Cir. 2019) (interview with the taxpayer's former attorney); *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1112 (10th Cir. 2017) (documents related to the operation of a marijuana dispensary); *Lowrie v. United States*, 824 F.2d 827, 831 (10th Cir. 1987) (documents seized in an allegedly illegal search); *Dickens v. United States*, 671 F.2d 969, 970 (6th Cir. 1982) (information gathered through an FBI wiretap); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (evidence seized in an allegedly illegal search).

In each case, the court concluded that, in the words of the Sixth Circuit, "the Anti-Injunction Act prohibits injunctions against IRS use of particular types of evidence in assessing or collecting taxes." *Dickens*, 671 F.3d at 971.

Any of these taxpayers might have described themselves as principally attempting to vindicate some evidentiary rule and only incidentally delaying or preventing the payment of tax, just as Meyer contends (Br. 20-21) that his motion was "not brought for the purpose of restraining assessment or collection of any tax," but merely "to enforce the district court's rules pertaining to discovery." But in this context, to determine a litigant's "purpose," the courts "inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." *CIC Servs.*, 141 S. Ct. at 1589. And a "suit designed to prohibit the use of information to calculate an assessment is a suit designed 'for the purpose of restraining' an assessment under the statute." *Dickens*, 671 F.2d at 971.

In short, as the Fifth Circuit observed in 1961, because civil tax matters are subject to *de novo* judicial review, courts should not

intervene in administrative investigations: "All questions touching on the weakness of the Director's case and the difficulty of proof will be before the courts for their review once the administrative function is completed. That is when the court may first come upon the scene; not before the investigation has been completed." *Campbell v. Guetersloh*, 287 F.2d 878, 881 (5th Cir. 1961).

In the District Court, Meyer argued that such cases were no longer good law, relying on the Supreme Court's 2021 decision in *CIC Services* (Doc. 110), but he does not discuss or even cite that case in his opening brief on appeal. Indeed, we read Meyer's brief as solely arguing that the Anti-Injunction Act is limited to "suits" as opposed to "motions" like his, rather than arguing that the Act does not apply to the kind of relief sought in his motion. (*See*, *infra*, pp. 31-34 (explaining that Meyer's "motion" loophole fails).) At all events, as the District Court observed (Doc. 112 at 6), *CIC Services* is distinguishable. In *CIC Services*, a tax-consulting firm sought to challenge an IRS notice that imposed a reporting requirement on firms facilitating certain tax-avoidance transactions. 141 S. Ct. at 1591. Failure to report could give

rise to a penalty (that was treated as a tax), but "[b]etween the upstream Notice and the downstream tax," the Supreme Court explained, "the river runs long." *Id.* The firm in *CIC Services* stood "nowhere near the cusp of tax liability." *Id.*

In cases challenging the IRS's use of evidence in a tax or penalty examination, however, the IRS is already considering whether to assess liability and in what amount. Indeed, when Meyer filed the motion here at issue, an IRS revenue agent had already completed a report proposing the assessment of particular penalties in particular amounts for particular tax years: in practical terms, the IRS was on the verge of assessment.

As the District Court correctly concluded (Doc. 106 at 7; Doc. 112 at 4), the Anti-Injunction Act bars taxpayers from bringing pre-assessment challenges to the evidence considered in IRS examinations. That long-standing rule, as articulated in *Campbell* and applied in case after case, properly bars Meyer from obtaining the relief that he sought in this case—namely, an order preventing the IRS from using his admissions to determine and assess Section 6700 penalties against him.

3. Meyer cannot avoid the Anti-Injunction Act by styling his request for injunctive relief as a motion in a closed case, rather than a new suit

Rather than contest the general rule that the Anti-Injunction Act bars suits to enjoin IRS examinations, or argue that his case falls within an exception to the Anti-Injunction Act, Meyer argues (Br. 17) that a *motion* is not a *suit*, and thus his *motion* to prohibit the IRS from using his admissions in its penalty examination does not fall within the literal language of the Anti-Injunction Act.

The Seventh Circuit rejected the identical gambit decades ago. *United States v. Dema*, 544 F.2d 1373, 1377 (7th Cir. 1976). In that case, the government sought to enforce an IRS summons against the taxpayer, and the district court concluded that a portion of the summons should be enforced but that another portion should be quashed. Shortly after the case was terminated, the IRS issued a notice of deficiency to the taxpayer, and the taxpayer filed a motion in the closed case seeking to hold the IRS in contempt of the court's order on the summons and to force withdrawal of the notice. *Id.* at 1375. The district court granted the motion, but the Seventh Circuit reversed.

As the Seventh Circuit reasoned, a taxpayer who asks a court to enjoin the IRS's efforts to assess tax due is effectively bringing a suit to enjoin assessment, regardless of how the request is styled:

> The net result of [taxpayer-]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 [the IRS] for injunctive relief, the potential result of which was in contravention of the spirit and purpose of § 7421(a).

Id. For this reason, the Seventh Circuit held it had been "improper for the district court to intervene and restrain [the IRS] from pursuing its assessment procedures." *Id.*

The District Court reached the same conclusion here. (Doc. 106 at 6; Doc. 112 at 4.) Indeed, as the District Court realized, to permit a taxpayer to "circumvent the Anti-Injunction Act's jurisdictional bar by styling his request [for an injunction] as a motion" would be even more unjustified here, because Meyer was not opposing the IRS in an ongoing dispute, but filed a new motion "in a closed case where his § 6700 penalty liability was never at issue." (Doc. 112 at 5.)

This conclusion is consistent with the text of the statute. The pertinent text of the Anti-Injunction Act was adopted by Congress in 1867. Act of Mar. 2, 1867, ch. 169 § 10, 14 Stat. 468, 475 ("And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."). Meyer relies on plain-language statutory interpretation cases, such as this Court's opinion in *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 488 (11th Cir. 2015), to argue that by mentioning "suit" in the Act, Congress excluded post-judgment protective motions. (Br. 20.) The normal rule of interpretation, however, is that courts "interpret[ ] a statute in accord with the ordinary public meaning of its terms *at the time of its enactment*." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020) (emphasis added). That approach permits people to "continue relying on the original meaning of the law." *Id.*

As already discussed in Part A, *supra*, the notion that a District Court might have authority to entertain a motion for a new protective order after a case is resolved is questionable even today. The Congress of 1867 drafted the Anti-Injunction Act decades before the Judiciary Act

of 1891, and a lifetime before the adoption of the Federal Rules of Civil Procedure and the modern discovery regime; at the time injunctive relief—an equitable remedy—was not available in a legal proceeding. *See generally, Injunctions*, 78 HARV. L. REV. 994, 1022-1023 (1965). At that time Congress and the courts would have viewed a "motion" like Meyer's, filed more than 18 months after entry of final judgment and seeking injunctive relief, as the initiation of a new proceeding.

Meyer also relies on the decisions of the Second and Third Circuits in a pair of related cases, *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), but those cases are inapposite. In *Mellon Bank* and *First Nat'l City Bank*, the IRS, seeking to enforce a jeopardy assessment, sued for access to a taxpayer's safe deposit box, and in each case the taxpayer sought to intervene to assert counterclaims. *Mellon Bank*, 521 F.2d at 710; *First Nat'l City Bank*, 568 F.2d at 855. The Third Circuit, which heard the first appeal, concluded that while intervention had been permissive, once the court allowed intervention it could not then decline to exercise jurisdiction over the asserted

counterclaims. *Mellon Bank*, 521 F.2d at 711. The Second Circuit agreed that the Anti-Injunction Act does not bar counterclaims—but also upheld the district court's denial of the taxpayer's motion for leave to intervene. *First Nat'l City Bank*, 568 F.2d at 856, 859.

Meyer contends that these cases are "analogous" to his. (Br. 10.) But neither concerned a taxpayer's request for injunctive relief. Indeed, in *Mellon Bank*, the Third Circuit distinguished the case before it from the more common cases where (as here) the Anti-Injunction Act "was used to deny injunctive relief to the taxpayer." 521 F.2d at 711 n.14. The Third Circuit was correct: *Mellon Bank* is distinguishable from cases like this one, where the taxpayer seeks injunctive relief.[10]

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[10] Taxpayer is wrong to characterize *Mellon Bank* and *First Nat'l City Bank* as "conclud[ing] 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." (Br. 23.) Again, the Court in *Mellon Bank* mentioned injunctive relief only to distinguish it from the counterclaims the taxpayer sought to raise in that proceeding, 521 F.2d at 711 n.14. In *First Nat'l City Bank*, 568 F.2d at 859, the taxpayer was not permitted to intervene for other reasons; thus the court never had occasion to decide whether he could obtain injunctive relief as an intervenor.

C. At all events, the District Court did not abuse its discretion in denying Meyer's post-judgment motion

Finally, even assuming that the District Court had jurisdiction to grant the requested relief here, its refusal to exercise such jurisdiction here was not an abuse of discretion. *Chicago Trib. Co.*, 263 F.3d at 1309; *Cash*, 327 F.3d at 1258.

Both the magistrate judge and the District Court acknowledged Meyer's argument that the Anti-Injunction Act only bars him from filing a "suit," whereas he had filed a *motion*. (Doc. 106 at 6, 9; Doc. 112 at 5.) Thus, both considered whether the granting of the requested relief was advisable. In this regard, the magistrate judge concluded that "the relief requested in the Motion violates the policy behind the Anti-Injunction Act and should be denied." (Doc. 106 at 6.) Similarly, the District Court concluded that "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.) In looking to the "policy" and "purpose" of the Anti-Injunction Act, Meyer contends, the District Court committed legal error; but the better view is that, confronted with a request to issue discretionary injunctive relief that

seemed to circumvent a statutory prohibition, 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. The Seventh Circuit did the same on essentially the same facts in *Dema*, 544 F.2d at 1377. In these circumstances, the District Court's decision not to grant discretionary relief was not a clear error of judgment.

Moreover, as both the magistrate judge and the District Court pointed out, Meyer will have an opportunity to obtain judicial review of any tax penalty actually assessed via a refund suit. (Doc. 106 at 10; Doc. 112 at 7.) As we have already observed, under the special Code provisions applicable here, the government will bear the burden of proof under I.R.C. § 6703(a), and the refund proceeding will be governed by the Federal Rules of Civil Procedure as a civil proceeding. Meyer will be free to object to the government's reliance on his admissions in that forum, and the court will be fully competent to enforce Rule 36(b) without any further direction from the District Court here. A discretionary injunction is not appropriate where an adequate remedy

is available. *Cash*, 327 F.3d at 1258. Under these circumstances, the District Court did not abuse its discretion in declining to grant the injunctive relief requested by Meyer.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Bethany B. Hauser

FRANCESCA UGOLINI (202) 514-3361
JENNIFER RUBIN (202) 307-0524
BETHANY B. HAUSER (202) 514-2830
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Appellate.TaxCivil@usdoj.gov
Bethany.B.Hauser@usdoj.gov

Of Counsel:

JUAN ANTONIO GONZALEZ
United States Attorney

NOVEMBER 29, 2021

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Attorney for United States

Dated: November 29, 2021