Are Whistleblower Appeal Filing Deadlines Jurisdictional?

By **Michael DeBlis** (June 18, 2018, 3:40 PM EDT)

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Are Internal Revenue Service deadlines stated in the Internal Revenue Code legally binding or can they be overridden by the courts? That is the question in David T. Myers v. Commissioner of Internal Revenue, case number 18-1003, which is is currently docketed before the U.S. Court of Appeals for the District of Columbia. It's an important case for two reasons. First, it's a case of first impression. And second, because the D.C. Circuit is the only place where IRS whistleblower cases can be appealed, the court's decision will affect all future whistleblower cases.

Myers v. Commissioner of Internal Revenue

In 2009, David Myers filed a claim with the IRS for compensation as a whistleblower. In March 2013, the agency sent him a letter denying his claim. Myers responded by sending a number of letters back to the IRS during 2013 and 2014, some of which included supporting material to back up his claim. The IRS responded three times during this period with letters informing Myers that his claim "still does not meet our criteria for an award." Finally, in February 2014, the IRS informed Myers that his claim had been closed on March 13, 2013. However, none of the IRS notices had explained that Myers had the option of filing an appeal with the U.S. Tax Court.

In January 2015, Myers decided to pursue legal action and petitioned the Tax Court. The IRS moved to dismiss the case on the grounds that Myers had failed to file a petition within the 30-day period specified in the IRC — IRC Section 7623(b)(4), to be specific — for whistleblower claims. The Tax Court agreed with the IRS that Myers had missed the 30-day window and that the case should be dismissed for lack of jurisdiction. The court's reading of this section of the IRC interpreted it as meaning that if the Tax Court receives a whistleblower petition more than 30 days after the IRS has made a decision on the claim, the court has no right to address it.

Understanding the Tax Court's Decision

The section of the IRC that explains the rights of whistleblowers to appeal IRS decisions — IRC Section 7623(b)(4) — reads as follows,
Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

The Tax Court's order denying Myers' request for reconsideration cited the case Kasper v. Commissioner of Internal Revenue.[1] As the court put it, "Kasper stands for the principle that the 30-day period under IRC Section 7623(b)(4) commences on the date of mailing or personal delivery of the determination to the claimant… ." In other words, the court believes that Myers' 30-day window to file a petition started in February 2014 on the day he received notice from the IRS that his claim had been closed. Because he didn't file a petition until

January 2015, he was well outside the 30-day limit.

In its published opinion, the court brought up the fact that the IRS had failed to send its notices by certified mail in violation of its own regulations. However, the court went on to say that because Myers openly admitted that he had received the IRS Whistleblower Office's notices and because his own emailed response proved that he had received all the notices by April 11, 2014, at the latest, the failure to use certified mail did not provide sufficient excuse for his missing the 30-day window.

The court based its decision that it lacked of jurisdiction in this case on the idea that its powers are limited to those that are expressly stated within the statute. When it comes to whistleblower cases, IRC Section 7623(b)(4) is the statute that gives the Tax Court jurisdiction. However, the court interpreted IRC Section 7623(b)(4) as only granting jurisdiction to petitions made within the 30-day window after an IRS determination.

In the Myers case, the Tax Court determined that each of the five IRS notices Myers received counted as a "determination" according to the IRC. It cited an earlier case, Comparini v. Commissioner of Internal Revenue,[2] in which the Tax Court found that the IRS Whistleblower Office could issue more than one determination for any given case. But because Myers didn't file his petition until much more than 30 days after any of the five notices/determinations, the court ruled that it did not have jurisdiction in this case.

The Grounds for Appeal

After the Tax Court denied Myers' request for reconsideration, he chose to file an appeal with the District of Columbia Circuit Court of Appeals. His brief argues that the 30-day filing deadline is not jurisdictional and therefore should not hold the court back from considering such cases. After all, IRC Section 7623(b)(4) uses the rather vague word "may" rather than "shall" when referring to the option for whistleblowers to appeal to the Tax Court within 30 days. In Sebelius v. Auburn Regional Medical Center,[3] the U.S. Supreme Court ruled that the word "may" in this context is not a clear statement and does not compel action. The brief also cites other appellate cases, including the wrongful IRS collections case Keohane v. United States [4] and the wrongful levy action Volpicelli v. United States,[5] as examples of cases where these courts held that similar filing deadlines are not jurisdictional.

Finally, the appeal brief argues that the 2013 notice of determination Myers received from the IRS never explained why the agency disallowed his claim or the fact that he had 30 days to file an appeal with the Tax Court. It also wasn't sent by certified mail, which IRS regulations at the time required for such notices. As a result, the brief says, the IRS notices shouldn't count as "determination" under the terms of IRC Section 7623(b)(4).

There are a number of cases currently pending that address the issue of whether tax filing deadlines should be considered jurisdictional — Nauflett v. Commissioner of Internal Revenue, Pfizer v. U.S. and Northern California Small Business Assistance Inc. v. Commissioner of Internal Revenue, among others. However, the Myers case is the only one that involves the IRS Whistleblower Office. The IRS is currently working to expand its whistleblower program, particularly with regards to cryptocurrency-related tax evasion. And as the number of whistleblower claims goes up as a result, the decision in the Myers case — however the Court of Appeals decides — will become increasingly important. It's influence could also stretch well beyond whistleblower cases since the core issue in question is whether or not tax filing deadlines in general are jurisdictional. All in all, this case is likely one that will have a major impact on future tax cases for some time to come.

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[1] Kasper v. Commissioner of Internal Revenue, 137 T.C. 37 (2011)

[2] Comparini v. Commissioner Internal Revenue, 143 T.C. 274 (2014)

[3] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013)

[4] Keohane v. United States, 399 U.S. App. D.C. 268, 669 F.3d 325 (2012)

[5] Volpicelli v. United States, 777 F.3d 1042 (9th Cir. 2015)