UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF DALLAS
DALLAS DIVISION

Cathy Landers, **Plaintiff,** v. The United States of America, The Internal Revenue Service, and Charles Rettig, in his official capacity as Commissioner of Internal Revenue, **Defendants.**	§ § § § § § § § § § § §	CIVIL CAUSE NO. 3:20-cv-00455-G

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

This case turns on the proper interpretation of a statute of the Internal Revenue Code (the "**Code**").[1] Section 6015(e) of the Code provides that "no ***levy*** or proceeding in court shall be ***made, begun, or prosecuted***" against an individual who has filed a request for innocent spouse relief until a statutorily-prescribed period has passed.[2] The government contends that this key provision only prohibits the IRS from "making" a levy, but not from "beginning" or "prosecuting" a levy.[3] One cannot "begin" or "prosecute" a levy, it argues, because the "making" of a levy is a single, discrete event that occurs the moment that a notice of levy is served upon a third party.[4] Further, the government contends that the 21-day levy-suspension period under 26 U.S.C. § 6332(c) has no impact[5]—that the levy is "made" when served, not at the conclusion of the 21-day period.

The government's position is incorrect—misleadingly so. This Opposition will address its glaring analytical flaws, but first, one must review what the Treasury and IRS said about the matter 27 years ago: "**the [then-new] 21-day rule [of 26 U.S.C. § 6332(c)] effectively changes the date of the *making* of a levy on bank deposits *to the date of the expiration of the 21-day holding period***

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[1] At the outset, the government's motion is procedurally deficient because it offers no competent evidence of a fact that is necessary (though not sufficient) to prevail on its factual theory. Plaintiff objects to the admission of Vincent Sandles's affidavit. (*See* Dkt. No. 12) To the extent that it purports to testify to the date that a levy was received by another party, it puts forward inadmissible hearsay. Moreover, it offers no testimony that the levy was sent by certified mail or any similar method, nor that any attachment is a relevant notice of levy receipt or that it was signed by an authorized person. *See* 26 C.F.R. § 301.6332-1(c). Finally, 26 C.F.R. § 301.6332-1(a)(1) requires that the levy notice must be issued/sent by the "district director." There is, however, not only no evidence establishing that the district director issued/sent the levy notice, but, unless Mr. Sandles supplements his affidavit to establish that he (given that he avers he mailed the notice) is the district director, his affidavit affirmatively establishes that the IRS failed to follow the procedure necessary to properly issue a levy notice. On information and belief, he is not the district director.

[2] 26 U.S.C. § 6015(e)(1)(B)(i) (emphasis added).

[3] Dkt. No. 11, at 5.

[4] Dkt. No. 11, at 2-3, 5.

[5] *E.g.*, Mot. at 3 ("In short, the levy is considered 'made' on the date and time it is received by the bank.")

or any extension of the period granted by the Internal Revenue Service."[6] The government has never retracted this statement—at least, not until approximately 21 days ago when it implicitly did so through its motion to dismiss ("**Motion**"). Generally, the government is required to go through a regulatory process to rescind final regulations that were promulgated through the APA process, as was the language above. Regardless, the government's Motion is conspicuously bereft of any reference to its own guidance on this issue.

But, even putting this strand of remarkably relevant words to the side, the government's position suffers from other serious shortcomings. It overlooks the language of the statutory provision at issue, ignores applicable rules of statutory construction, and runs contrary to Supreme Court and Fifth Circuit directives, which provide that "where the intent of meaning of tax statutes, or **statutes levying taxes**, is doubtful, they are, unless a contrary legislative intention appears, to be construed most strongly against the government and in favor of the taxpayer or citizen."[7]

> The statute at issue, 26 U.S.C. § 6015(e)(1)(B)(i), effectively provides that:
>
> ***no levy*** or proceeding in court shall be ***made, begun, or prosecuted*** against the individual until the IRS renders a determination on the merits of the innocent spouse request and sends such determination to the innocent spouse via certified or registered mail.
>
> The issues presented are as follows:

- Whether the IRS "made" a levy, within the meaning of § 6015(e)(1)(B)(i), after Ms. Landers filed an Innocent Spouse claim where the bank received a Notice of Levy on December 11, 2019; Ms. Landers filed an Innocent Spouse claim on December 20, 2019; and the IRS effectuated the seizure portion of the levy through the transfer of her account funds in January of 2020 after the statutory 21-day non-levy period expired.

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[6] Fed. Reg. Vol. 58, No. 1, p. 16 (Jan. 4, 1993) (emphasis added), available at https://www.govinfo.gov/content/pkg/FR-1993-01-04/pdf/FR-1993-01-04.pdf#page=26.

[7] *Tandy Leather Co. v. United States*, 347 F.2d 693, 695 (5th Cir. 1965) (emphasis added); *see also Gould v. Gould*, 245 U.S. 151, 153 (1917) ("In the interpretation of statutes levying taxes . . . they are construed most strongly against the government, and in favor of the citizen."); *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be included to rely on the traditional canon that construes revenue-raising laws against their drafter.").

- If the Court finds that the IRS did not violate the "ma[k]e"-a-levy provision of § 6015(e)(1)(B)(i), the following issue must be addressed: Whether that provision also prohibits the IRS from "prosecuting" a levy, and, if so, whether the IRS violated—or, upon development of a factual record,[8] could potentially have violated—the prohibition against "prosecut[ing]" a levy after an innocent spouse claim had been filed.

A clear conception of the precise issues is important here, because the government, through its Motion, seeks to recast this suit into one that is statutorily barred under the Anti-Injunction Act[9]—that is, to cast it as one seeking a determination *from this Court* of whether Ms. Landers qualifies for innocent spouse protection.[10] To the contrary, however, Ms. Landers has deliberately and precisely pled this action as one under 26 U.S.C. § 6015(e)(1)(B), and she is seeking a declaratory judgment and relief under the Administrative Procedures Act for violations of her procedural rights. She has, again deliberately, not asked for relief with respect to the substantive tax liability, nor any ruling on her ultimate liability for any such tax. She recognizes that this Court does not have jurisdiction to make such determinations in this procedural posture.

The government, nonetheless, superficially frames this case as one that is barred under the Anti-Injunction Act—arguing that the Court lacks subject-matter jurisdiction because "[a]t its heart, Plaintiff is disputing whether she is liable to pay the outstanding joint federal income tax liability with her ex-husband."[11] But if every suit to protect such a procedural right, such as the one at issue here,

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[8] In this regard, there may be a host of facts that could bear upon the question of whether the IRS "prosecuted" the levy after the claim was filed. For instance, did the IRS have any communications with the bank after the Innocent Spouse Claim was filed? Did the IRS take internal steps to support its position or make other formal decisions in furtherance of the levy process? Did it have any interaction with any third party? Certainly the IRS's acts set forth in the parties' pleadings may, as a matter of law (and as Plaintiff contends), have constituted a prosecution of the levy process after the claim. But if the Court were to determine that the pleadings do not inherently establish this, then numerous facts (that are within the scope of what has been pleaded generally) could be relevant to whether the IRS prosecuted the levy process after the notice. Those facts can only be developed into competent evidence through discovery, and Plaintiff has no obligation to set out her litigation strategy in that regard at this stage.

[9] 26 U.S.C. § 7421.

[10] Dkt. No. 11, at 8.

[11] Dkt. No. 11, at 8.

could be converted into a suit that is, "at its heart," a suit over "whether [the taxpayer] is liable to pay the outstanding" tax merely because the government so contends (particularly in the face of clear and precise pleadings that indicate otherwise), it would render such statutory protections meaningless and contravene the legislative intent underlying such protection. At any rate, the government's position is expressly foreclosed by the very authority that it invokes: the Anti-Injunction Act, *see* 26 U.S.C. § 7421(a), which begins as follows: "*Except as provided in section 6015(e) . . .*" These six words are dispositive and resolve the jurisdictional issue against the government. The Anti-Injunction Act does not apply here.

But while the ultimate tax liability is not raised or at issue in this case, certain facts that may be relevant to that ultimate-liability question are *also relevant* to issues raised by the government in its Motion, such as judicial exceptions to the Anti-Injunction Act. A brief summary of such facts is set out below for context and for the Court's benefit:[12] Ms. Landers is 55 years old. She does not own a home. In fact, she has been forced to live with her daughter due to her financial position. She does not have a job. She had no involvement whatsoever with respect to the business that gave rise to the income relating to the underlying tax at issue. Moreover, she is divorced from the ex-spouse who exercised all such control and who pilfered millions on himself and his other, secret/second wife and family; and the district court that granted their divorce provided that the ex-spouse was entirely liable for that underlying tax.

Multiple witnesses have provided statements averring to the fact that she was abused, belittled, and psychologically destroyed by a controlling ex-husband. Nonetheless, the IRS, through the levy at issue, seized virtually every penny to her name to satisfy his tax liability despite the fact that she presented and had pending a clearly meritorious claim for innocent spouse relief. It refused to cease

[12] Should the Court believe that any facts set forth below are material to its decision on this Motion, but that their absence from a pleading is procedurally significant, Plaintiff requests leave to amend her pleading to set forth and aver such facts.

making and prosecuting the levy. Remarkably, despite her status as a high-risk category for the novel coronavirus, during the pendency of this matter DOJ counsel refused to even respond to her counsel's proposal to extend some of the wrongfully-seized funds to her during the epidemic or to discuss a proposed "amicable resolution" that could have avoided wasting judicial resources.[13]

Background

On December 5, 2019, the IRS issued a Notice of Levy to InTouch Credit Union ("**ICU**") to seize funds held in a bank account owned by Ms. Landers.[14] On December 11, 2019, ICU received the Notice of Levy.[15] Pursuant to 26 U.S.C. § 6332(c), which prohibits a bank from surrendering funds subject to a notice of levy for 21 days (and thus implicitly prohibits the IRS from effectuating the seizure portion of the levy process for 21 days), the IRS could not seize the funds held with ICU

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[13] On April 24, 2020, undersigned counsel, Mr. Freeman, sent an email to DOJ counsel, indicating that he would not oppose the DOJ's request for an extension of time to file its response or answer (to allow it time to consult with the IRS National Office on the legal issues involved in this case), and proposed a reasonable alternative that would have allowed DOJ counsel to table this case during the height of the coronavirus pandemic. That email provided:

> This case may warrant a discussion when you have some time. We have an innocent spouse claim that is pending with the IRS . . . . We frankly just want, if possible, to make some resources available to our client while that is pending, as she is in a financially difficult situation in light of the levy and the coronavirus. She is a high-risk (relatively older) woman.
>
> I mention this because this case may be one where there is an avenue to reach an amicable resolution, if your office is inclined to. Ultimately, if the innocent spouse claim prevails, she would receive the funds back anyway. Given that these are unusual times and there are unusual factors in light of COVID-19, I would like to propose the concept of potentially agreeing to a release of the funds back to her during this time and/or seeking to have the innocent spouse claim processing (within the IRS) fast tracked, as that might resolve the issues presented here.
>
> At any rate, I recognize this is not something that you can likely give me an immediate answer on, but wanted to give you a little background to possibly help facilitate a call between us in hopes that there is some chance of an amicable resolution to this one.

DOJ counsel responded by email: "Let's plan on talking once I have more input from the IRS about the legal issues in the case. Thanks for allowing me to file the motion unopposed."

Despite this response, the DOJ never responded; never addressed the proposal; and instead filed a motion to dismiss.

[14] Dkt. No. 1, ¶ 13.

[15] Dkt. No. 11.

until on or after January 1, 2020. During this 21-day period, the taxpayer may request, and the IRS may unilaterally impose, an extension of the 21-day period,[16] or "may take action to release the levy on the bank account."[17]

On December 20, 2019, only days after the Notice of Levy was served on ICU, Plaintiff filed a 52-page, detailed innocent spouse request with the IRS.[18] In her request for innocent spouse relief, Plaintiff maintained that her ex-spouse should be solely liable for the joint tax liabilities at issue in this case under 26 U.S.C. § 6015(f), which permits relief from joint tax liability on grounds of equity.[19] Although her request was filed within Section 6332(c)'s 21-day period, and despite the fact that her counsel specifically informed the levying revenue officer, Mr. Sandles, that continuing to prosecute the levy would run afoul of the statutory prohibition,[20] the IRS continued to make and prosecute the levy—refusing to extend the period or release the levy—and seized substantially all of the funds that she held with ICU, leaving her with only $172.54 in the account.[21]

On February 24, 2020, Plaintiff filed her Original Complaint with respect to the government's violations of the statutory prohibition against a levy under 26 U.S.C. § 6015(e)(1)(B)(i), which effectively provides that:

> ***no levy*** or proceeding in court shall be ***made, begun, or prosecuted*** against the individual until the IRS renders a determination on the merits of the innocent spouse request and sends such determination to the innocent spouse via certified or registered mail.[22]

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[16] 26 C.F.R. § 301.6332-3(c)(1), (d)(2).

[17] 26 C.F.R. § 301.6332-3(d)(3).

[18] Dkt. No. 1, ¶ 14.

[19] *Id.*

[20] Ex. A.

[21] Dkt. No. 1, ¶ 16.

[22] Dkt. No. 1.

She maintains that the IRS was prohibited from making and prosecuting the levy against her while her innocent spouse request was pending.

On May 22, 2020, the government filed a motion to dismiss Plaintiff's claims for lack of subject-matter jurisdiction.[23] According to the government, the IRS was not prohibited from levying or seizing the funds held by ICU because 26 U.S.C. § 6015(e)(1)(B)(i) only prohibits the IRS from "making"—but not from "beginning" or "prosecuting"—a levy after an innocent spouse request has been filed.[24] Thus, the government contends that the Court lacks subject-matter jurisdiction over Plaintiff's claims under the Anti-Injunction Act.[25]

I. This Court has Subject-Matter Jurisdiction over all of Plaintiff's Claims.

A. This Court has Subject-Matter Jurisdiction over Plaintiff's Claims under 26 U.S.C. § 6015(e)(1)(B).

Plaintiff and the government disagree about the statutory interpretation of 26 U.S.C. § 6015(e)(1)(B)(i). That provision states as follows:

> Except as otherwise provided in section 6851 or 6861, ***no levy or proceeding in court shall be made, begun, or prosecuted*** against the individual . . . requesting equitable relief under subsection (f) for collection of any assessment to which such . . . request relates until the close of the 90th day referred to in subparagraph (A)(ii), or, if a petition has been filed with the Tax Court under subparagraph (A), until the decision of the Tax Court has become final.

In its Motion, the government contends that the verb "made" modifies only the antecedent term "levy" and that the remaining verbs "begun" and "prosecuted" modify only the antecedent phrase "proceeding in court."[26] Leveraging this unorthodox and unprincipled noun-to-verb matching

[23] Dkt. No. 11.

[24] Dkt. No. 11, at 2, 5-6.

[25] Dkt. No. 11, at 8.

[26] Dkt. No. 11, at 5 and 7.

convention, rather than Occam's Razor, it argues that the statute merely prohibits the IRS from (i) making a levy or (ii) beginning or prosecuting a court proceeding, but does not prohibit the IRS from beginning or prosecuting a levy. Plaintiff, on the other hand, contends that Congress meant what it said and said what it meant: The IRS may not "ma[k]e, beg[i]n, or prosecute[ ]" a levy action after an innocent spouse claim has been filed under 26 U.S.C. § 6015. Its words—each of them—must be given meaning absent compelling evidence that Congress intended otherwise. And in any event, ambiguity should be construed in favor of the taxpayer.[27]

1. <u>The Government Improperly "Made" the Levy after Plaintiff filed for Innocent Spouse Protection.</u>

The government concedes that it may not "make" a levy after a request for innocent spouse relief has been filed.[28] However, the government incorrectly posits that a levy is made, for purposes of 26 U.S.C. §§ 6331 and 6332(c), when the notice of levy is served on a third party.[29] Although a levy is generally made upon service of a notice of levy in many other contexts outside a bank levy, this is not the case when (as here) a levy has been made on a bank account.

26 U.S.C. § 6332(c) provides special rules for IRS bank levies. Specifically, that provision states that "[a]ny bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy." 26 U.S.C. § 6332(c) was added to the Code as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342.

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[27] *Tandy Leather Co.*, 347 F.2d at 695; *Gould*, 245 U.S. at 153; *United Dominion Indus., Inc.*, 532 U.S. at 839.

[28] Dkt. No. 11, at 2 ("The issue of when an IRS levy is considered to have been made is key to determining whether the IRS violated the injunction, provided in Section 6015(e)(1)(B)(i), that stops the IRS, until certain conditions are met, from taking affirmative action to collect a tax debt, including making levies, after a taxpayer files an innocent spouse claim.").

[29] Dkt. No. 11, at 4.

On December 31, 1992, the Treasury Department published final regulations in the Federal Register providing interpretative guidance with respect to 26 U.S.C. § 6332. The regulations were effective on January 4, 1993, and "apply with respect to levies made on or after January 4, 1993." In the Explanation of Provisions portion of the final regulations, Treasury explained:

> [T]he [new] 21-day rule effectively changes the date of the ***making*** of a levy on bank deposits to the date of the expiration of the 21-day holding period or any extension of the period granted by the Internal Revenue Service.[30]

(emphasis added.).[31] Of course, this interpretation of Section 6332(c) makes sense because the statutory provision likewise requires the bank to pay any interest on the bank funds accumulated during the 21-day holding period. In like manner, under IRS regulations the taxpayer-account holder is treated as receiving the interest that accrued during this 21-day period as a payment from the bank and is subject to tax thereon.[32]

Here, it is undisputed that Plaintiff filed her request for innocent spouse relief *prior* to the expiration of the 21-day holding period.[33] Accordingly, the government's own regulatory guidance (indeed, its own interpretative understanding) on 26 U.S.C. § 6332(c) precludes it from now asserting that the levy was "made" when the notice of levy was served on ICU. Thus, because Plaintiff filed her request for innocent spouse relief on December 20, 2019, and because the IRS "made the levy" in January 2020, or after expiration of the 21-day holding period, the IRS violated the levy prohibition of 26 U.S.C. § 6015(e)(1)(B).

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[30] 26 U.S.C. § 6332(d) provides personal liability for "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary." Notably, this provision can apply outside the context of bank levies. However, as shown above, Treasury concluded that 26 U.S.C. § 6332(d), when working in tandem with 26 U.S.C. § 6332(c), renders the levy to be "made" on the date of the expiration of the 21-day holding period.

[31] Fed. Reg. Vol. 58, No. 1 (Jan. 4, 1993) (emphasis added), available at https://www.govinfo.gov/content/pkg/FR-1993-01-04/pdf/FR-1993-01-04.pdf#page=26.

[32] *See* 26 C.F.R. § 301.6332-3(c)(2).

[33] Dkt. No. 11, at 1.

2. <u>The IRS Levy Encompasses a Process and not Simply the Single, Discrete Act of "Making" of a Levy.</u>

Alternatively, even if the levy was "made" when the notice of levy was served on ICU (a point in which Plaintiff disagrees), 26 U.S.C. § 6015(e)(1)(B)(i)'s prohibition on "prosecuting" a levy would likewise prohibit the IRS from seizing the ICU funds. In its Motion, the government seeks to characterize an IRS levy as a single, discrete event.[34] Specifically, the government contends that a levy occurs when it is "made," *i.e.*, when notice of levy has been served on a third party, and that the concepts of "beginning" or "prosecuting" a levy are, therefore, effectively irrelevant.[35] Federal tax law states otherwise.

Contrary to the government's arguments, a levy is a process—it involves the distraint of property and, when prosecuted to completion, ultimately results in the seizure of property. Indeed, the Code, Treasury Regulations, and federal case law all make clear that the administrative levy is not a single, discrete event, but instead encompasses an entire process outside the service of a notice of levy. According to federal case law, the levy is a "summary, ***<u>non-judicial process</u>***," which when validly invoked by the IRS "effects a seizure of the delinquent's property tantamount to a transferal of ownership."[36] In addition, the Code and Treasury Regulations confirm that a levy is a process. For example, 26 U.S.C. § 6331(b) defines the term "levy" as the power of distraint and seizure by any means.[37] Moreover, 26 U.S.C. §§ 6331 through 6343 provide specifics regarding the levy process,

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[34] Dkt. No. 11, at 2-3.

[35] Dkt. No. 11, at 5-8.

[36] *U.S. v. Sullivan*, 300 F.2d 100, 116 (3d Cir. 1964); *see also In re Quality Health Care,* 215 B.R. 543 (Bankr. N.D. Ind. 1997) ("An IRS levy is completed as to cash or a cash equivalent **<u>when the procedures found in IRC Sec. 6331 and IRC Sec. 6332 of Title 26 are performed. Section 6331 of the IRC governs levy; Section 6332 governs surrender</u>**.").

[37] *See also* 26 U.S.C. § 7701(a)(21) (same).

from levy and distraint,[38] to surrender of property subject to levy,[39] to the potential release of a levy and return of property.[40] Treasury Regulations further provide that the term "levy," for purposes of 26 U.S.C. § 6015(e)(1)(B), means "an administrative levy or seizure described by section 6331."[41]

In the context of a bank levy, Congress has statutorily provided that the levy process must occur over 21 days. Indeed, the levy process does not start and cease on the first day, as the government contends. Specifically, 26 U.S.C. § 6332(c) prohibits a bank from surrendering funds during a 21-day period after service of the notice of levy. This 21-day holding period provides an opportunity for taxpayers to address and settle questions about ownership over the account or the propriety of the levy itself.[42] During this period, the IRS may advise the bank that the 21-day period has been extended before it completes its levy[43] and "may take action to *release* the levy on the bank account."[44] The very concept that the IRS may "release" the levy underscores that the levy is a process that is not completed until it results in the ultimate seizure of the funds.

Not surprisingly, the IRS itself describes the levy as a "process." In its own Internal Revenue Manual ("**IRM**"),[45] it advises IRS personnel that certain parts of the IRM "provide revenue officers and advisors an overview of the ***levy process***."[46] In another part of the IRM, it instructs IRS

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[38] 26 U.S.C. § 6331.

[39] 26 U.S.C. § 6332.

[40] 26 U.S.C. § 6343.

[41] 26 C.F.R. § 1.6015-7(c)(4).

[42] *Stead v. United States*, 419 F.3d 944, 949 (9th Cir. 2005) ("[T]he twenty-one-day holding provision of I.R.C. § 6332(c) . . . [is] designed to protect the taxpayer from unwarranted tax levies . . .").

[43] 26 C.F.R. § 301.6332-3(c)(1), (d)(2).

[44] 26 C.F.R. § 301.6332-3(d)(3) (emphasis added).

[45] The Internal Revenue Manual is the "official compilation of IRS policies, procedures, and guidelines." IRM pt. 1.11.6.1.1 (7-28-2017). Although the IRM does not "carry the force and effect of law," it does effectively provide the agency's own interpretation of the Code.

[46] IRM pt. 5.11.1.1 (11-09-2017).

personnel: "This Internal Revenue Manual (IRM) section provides revenue officers, collection advisors and specialty collection insolvency advisors directions for the ***levy process*** which is impacted by IRC 6343, as well as by the taxpayer bill of rights and by IRS policy statements.".[47] And in yet another part of the IRM, it states: "This Internal Revenue Manual (IRM) section describes the ***process and procedures for serving notices of levy*** on delinquent taxpayers' bank accounts."[48]

Moreover, the view that a levy is a process is supported by case law not only in the federal tax law context, but in other areas of law that must be reconciled. For example, in *U.S. v. Whiting Pools, Inc.*,[49] the United States Supreme Court held that where the IRS levied and seized property of a debtor prior to its filing for bankruptcy, the levied property was nonetheless part of the bankruptcy estate. In so holding, the Court reviewed the levy provisions of the Code and reasoned that a levy under 26 U.S.C. § 6331 does not actually transfer ownership of the levied property to the IRS, but that the IRS merely takes on a possessory interest in the property with actual ownership remaining with the debtor/taxpayer. Thus, the Court concluded that 26 U.S.C. §§ 6331 and 6332 were provisional remedies that did not determine the IRS' rights to the seized property but "merely . . . [brought the property] into the Service's legal custody."[50] The outcome and reasoning of *Whiting Pools* demonstrates that a levy is a process—and that it is, in fact, part of a larger process of converting the interest in the property (the interest that is realized through the mechanism of levy) into an ownership interest.[51]

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[47] IRM pt. 5.11.2.1.1 (12-26-2018).

[48] IRM pt. 5.11.4.1 (2-15-2018).

[49] 462 U.S. 198 (1983).

[50] 462 U.S. at 211 ("They [26 U.S.C. §§ 6331 and 6332] are provisional remedies that do not determine the Service's rights to the seized property . . .").

[51] *See also Giaimo v. U.S.*, 194 B.R. 210 (E.D. Mo. 1996) (*Whiting Pools* rationale applies equally to funds levied in a bank account); *In re Challenge Air International, Inc.*, 952 F.2d 384 (11th Cir. 1992) (*Whiting Pools* rationale applies equally to intangible assets); *Stead v. U.S.*, 419 F.3d 944, 947-48 (9th Cir. 2005) (*Whiting Pools* "framework applies to cash and cash equivalents.").

In fact, in line with the rationale of *Whiting Pools*, in serving the Notice of Levy, the IRS explicitly recognized that it did not hold ownership of funds held by a bank during the 21-day holding period. Here, the Notice of Levy issued to Plaintiff stated:

> Banks, credit unions, savings and loans, and similar institutions described in section 408(n) of the Internal Revenue Code must hold **your money** for 21 calendar days before sending it to us. They must include the interest **you earn** during that time. Anyone else we send a levy to must turn over your money, property, credits, etc. that they have (or are already obligated for) when they would have paid you.[52]

In addition, a taxpayer is required to pay tax on the interest that was earned on the principal during the 21-day period.[53] All of these facts are inconsistent with the notion put forward by the government that the seizure has been effectuated prior to the close of the 21-day period—*i.e.*, that the levy has been "made" and completed or fully prosecuted in one fell swoop.

3. Because the IRS Levy is a Process, 26 U.S.C. § 6015(e)(1)(B) Prohibits the IRS from Completing - *i.e.*, Prosecuting - the Levy After an Innocent Spouse Claim has been Filed.

Notwithstanding the above federal tax authority, the government argues that one cannot "prosecute" a levy.[54] That is incorrect, and the statutory language certainly does not compel such an interpretation. Merriam-Webster Dictionary and Black's Law Dictionary both recognize that the verb "prosecute" has two meanings, either of which could apply in this context. Specifically, Merriam-Webster defines "prosecute" to mean: (1) "to follow to the end: pursue until finished;" (2) "to engage in: PERFORM;" or (3) to bring legal action or to institute legal proceedings.[55] Similarly, Black Law's

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[52] Ex. B.

[53] 26 C.F.R. § 301.6332-3(c)(2); *see also In re Quality Health Care*, 215 B.R. 543 (Bankr. N.D. Ind. 1997) ("It is utterly inconsistent for the IRS to contend, as it does here, that serving a notice of levy on a bank results in the immediate transfer of ownership of the funds on deposit from the Debtor to the IRS while at the same time requiring Debtor to report interest accruing on the funds as income pursuant to the [Regulations].").

[54] Dkt. No. 11, at 6.

[55] Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/prosecute.

Dictionary defines "prosecute" to mean either: (1) "to commence and carry out (a legal action");" or (2) "to engage in; carry on."[56] Notably, federal courts, including the Fifth Circuit Court of Appeals, have also recognized that the verb "prosecute" can mean "to follow to the end: pursue until finished."[57] Because the meaning of the verb "prosecute" has varied meanings, the Court should construe its meaning in the manner that favors the taxpayer.[58] Alternatively, the Court should utilize other canons of statutory construction to aid in deciphering that term's meaning for purposes of 26 U.S.C. § 6015(e)(1)(B)(i).[59]

A long-standing principle of statutory construction holds that "[w]hen several words are followed by a clause which is applicable to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[60] Here, a natural construction of the language of 26 U.S.C. § 6015(e)(1)(B)—and the phrase "made, begun, or prosecuted"—similarly demands that such terms be read as applicable to both "levy" and "proceeding in court." To pick and choose verb-noun pairings in an unprincipled manner invites uncertainty and uneven application of the law.

Moreover, a "cardinal rule" of statutory construction holds that a term should not be read in isolation but rather the "statutory language must be read in context because a phrase gathers meaning from the words around it."[61] Here, the government seeks to isolate the verb "prosecute" from the

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[56] Black's Law Dictionary (11th ed. 2019), *attached as* Exhibit C.

[57] *See, e.g., Dallas Gas Partners, LP v. Prospect Energy Corp.*, 733 F.3d 148, 157-58 (5th Cir. 2013); *see also GRK Fasteners, Ltd. v. Bennett*, 2004 WL 2260600 (D. Ct. Or. Oct. 5, 2004) (same).

[58] *United Dominion Indus., Inc. v. U.S.*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring); *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Tandy Leather Co. v. United States*, 347 F.2d 693, 695 (5th Cir. 1965).

[59] *Nat. Res. Def. Council, Inv. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

[60] *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920); *see also Paroline v. U.S.*, 572 U.S. 434, 447 (2014).

[61] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Howard Hughes Co., LLC v. Commissioner*, 805 F.3d 175, 180-81 (5th Cir. 2015).

other verbs "made and begun." But, Congress has evidenced its understanding of the levy process and the "beginning" of such process in other provisions of the Internal Revenue Code. For example, 26 U.S.C. § 6330(e)(1) provides that "[n]otwithstanding the provisions of section 7421(a), the ***beginning of a levy or proceeding***" shall be stayed during the period in which the taxpayer has timely requested a Collection Due Process hearing. This provision was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685—the same legislative act in which 26 U.S.C. 6015(e)(1)(B) was enacted. Accordingly, because Congress used the same terminology in different parts of the same legislative act, it clearly understood the meaning it attached to the verb "begun" in 26 U.S.C. § 6015(e)(1)(B)(i).

Moreover, this understanding is also set out in the clause that immediately follows 26 U.S.C. § 6015(e)(1)(B)(i). 26 U.S.C. § 6015(e)(1)(B)(ii) provides that "during the time the prohibition under . . . [26 U.S.C. § 6015(e)(1)(B)(i)] is in force, the "***beginning of such levy or proceeding*** . . . may be enjoined by a proceeding in the proper court." Thus, the government's contention that the verb "begun" modifies only the term "proceeding in court" is clearly erroneous.

The government's argument otherwise is significant because the distinction in the statute is relevant to the meaning of "prosecuted." Specifically, if the verbs "made" and "begun" modify the antecedent term "levy," as they clearly do, this evidences Congress' intent to prohibit a full range of levy action after an innocent spouse claim has been filed. Notably, the IRS cannot make a levy without first beginning the levy process itself. A "beginning" obviously implies an end, and these two points punctuate a "process" that must be prosecuted in order to span from the beginning to the end. Thus, because Congress unquestionably sought to prohibit the "beginning" and the "making" of a levy after an innocent spouse claim has been filed (and because the very concept of "beginning" implies an ending, and thus a process), it is logical that Congress also sought to prohibit the next step of the levy process—the prosecution or completion of the levy including seizure.

4. <u>There is No Legal Support for the Government's Interpretation of 26 U.S.C. § 6015(e)(1)(B)(i).</u>

In its Motion, the government contends that "[t]he law supports a reading that the word prosecute only applies to proceedings in court and not to the initial process of serving the IRS levy on a bank (*a.k.a.*, making the levy)."[62] Although far from clear, Plaintiff best understands the government to set forth three reasons why, according to the government, the law supports its interpretation.

First, the government contends that the term "prosecute" does not appear in 26 C.F.R. § 301.6331-1, but that the term "'made' appears multiple times."[63] It is unclear how or even why this is legally significant. If anything, it signifies a weakness in the government's argument. As Ms. Landers demonstrates, the *statute* at issue assuredly *does* contain the word "prosecute." Moreover, the fact that the term "prosecute" is not found in the Treasury Regulations cited by the government is not surprising (or legally significant) because that Regulation was promulgated in 1954; the statutory language of 26 U.S.C. § 6015(e)(1)(B), on the other hand, was enacted 44 years later as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. The IRS never updated the regulation after the statute was enacted.

Furthermore, Congress did not haphazardly pass the 1998 Act. It contained a unifying theme that is particularly relevant here. Known as the "Taxpayer Bill of Rights 3," it was expressly intended to provide taxpayers with structural protections against IRS collection activities. Indeed, the Taxpayer Bill of Rights 3 was specifically intended to enhance innocent spouse relief[64] (including through the

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[62] Dkt. No. 11, at 6.

[63] *Id.*

[64] H.R. 105-364, 31 ("The bill contains a number of provisions designed to strengthen the rights of taxpayers in their dealings with the Internal Revenue Service. Among the more significant of these provisions are modifying the burden of proof, providing more generous innocent spouse relief. . . ."); S.R. 105-174, 55 ("The Committee is concerned that the innocent spouse provisions of present law are inadequate.")

very provisions at issue in this case) and to provide protections against IRS levies.[65] Viewed against this background, the terms at issue should be interpreted in favor of extending relief, not restricting it—and certainly not in the name of a subsequently-enacted statutory phrase that was not referenced in regulations because those regulations were written nearly half a century before the statute was enacted.

Second, the government contends that a United States Tax Court's memorandum opinion supports its interpretation.[66] More specifically, the government cites to a single sentence in the thirty-nine page memorandum opinion of *Hoover v. Commissioner*,[67] which states: "Section 6213(a) generally restricts when the Commissioner may assess a deficiency, make a levy determination, and begin or prosecute a collection action in a court proceeding."[68] Based on this lone sentence, which was not relevant to the Court's primary holding, the government suggests that the Tax Court "associated the term 'make' with a levy, and the term 'prosecute' with starting a collection action in a court proceeding."[69] However, the government's reliance on *Hoover* is misplaced.

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[65] *See, e.g.,* Senate Finance Committee Rept. 105-174, 68 ("The provision establishes formal procedures designed to insure due process where the IRS seeks to collect taxes by levy (including by seizure)."); *id.* at 78 (("The provision requires the IRS to implement an approval process under which any lien, levy or seizure would be approved by a supervisor, who would review the taxpayer's information, verify that a balance is due, and affirm that a lien, levy or seizure is appropriate under the circumstances."); *id.* at 79 ("The provision increases the value of personal effects exempt from levy."); *id.* at ("The IRS is required to immediately release a wage levy upon agreement with the taxpayer that the tax is not collectible."); *Id.* at 80 ("The provision requires the IRS to withhold collection by levy of liabilities that are the subject of a refund suit during the pendency of the litigation. This will only apply when refund suits can be brought without the full payment of the tax, i.e., in the case of divisible taxes. Collection by levy would be withheld unless jeopardy exists or the taxpayer waives the suspension of collection in writing (because collection will stop the running of interest and penalties on the tax liability).")

[66] Dkt. No. 11, at 6-7.

[67] T.C. Memo. 2006-82.

[68] Dkt. No. 11, at 6.

[69] Dkt. No. 11, at 6-7.

It is well established that the United States Tax Court's memorandum opinions are not "binding precedent" and should not be relied upon for decisions in future cases.[70] Next, the government's reliance on a single sentence in the memorandum opinion interpreting a different Internal Revenue Code provision – 26 U.S.C. § 6213(a) – warrants no deference here because there is no indication that the Tax Court gave any particular focus or significance to this language, or that it turned its attention to this issue in any manner. In any event, the sentence cited by the government was not instrumental to the Tax Court's decision and therefore constitutes dicta—dicta in a non-precedential case. Finally, the Tax Court itself has interpreted 26 U.S.C. § 6015(e)(1)(B)(i)—the precise provision at issue here—in a memorandum decision in the same manner as Plaintiff interprets that provision. Specifically, the Tax Court interpreted 26 U.S.C. § 6015(e)(1)(B) to provide: "***no levy * * * shall be made, begun, or prosecuted*** against the individual . . ."[71] Therefore, the Tax Court has interpreted the key phrase "made, begun, or prosecuted" to commonsensically refer to the antecedent term "levy."

Third, the government contends that a prohibited "prosecution" under 26 U.S.C. § 6331(e) may occur when a third party fails to surrender property or property rights subject to a levy after being served with a Notice of Levy.[72] Plaintiff does not dispute that levy against a third party would be prohibited, but also notes that 26 U.S.C. § 6015(e)(1)(B)(i) directly prohibits levy action "against the individual" who made the innocent spouse claim (here, Plaintiff). In fact, the statute speaks only in

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[70] *See, e.g., Stratmore v. Commissioner*, 48 T.C.M. (CCH) 1369 (1984) ("memorandum opinions are limited to their own 'precise factual situation'"); *Nico v. Commissioner*, 67 T.C. 647, 654 (1977) ("We consider neither revenue rulings nor memorandum opinions of this Court to be controlling precedent"); *Newman v. Commissioner*, 68 T.C. 494 n. 4 (1977) ("To the extent the case stands for more, it is a Memorandum Opinion of this Court that is not controlling precedent . . .").

[71] *Freeman v. Commissioner*, T.C. Memo. 2007-28, *aff'd in part and vacated in part on other grounds sub. nom.*, *Keller v. Comm'r*, 568 F.3d 710 (9th Cir. 2009).

[72] Dkt. No. 11, at 7.

terms of levies and actions against the individual making the innocent spouse request, which runs counter to the government's argument.

In sum, the government has not provided any legal support to the Court for its interpretation that the verb "prosecute" must be interpreted solely to modify the term "proceeding in court." For these and the reasons already provided above, the Court should deny the government's Motion.

B. This Court has Jurisdiction over Plaintiff's Claims under the Declaratory Judgment Act and the Administrative Procedure Act.

The government also contends that the Court lacks subject-matter jurisdiction over Plaintiff's claims under the Declaratory Judgment Act[73] because "[a]t its heart, Plaintiff is disputing whether she is liable to pay the outstanding joint federal income tax liability with her ex-husband."[74] Plaintiff disagrees. Plaintiff is *not* disputing whether she is liable to pay the joint income tax liabilities at issue in this case, which will be resolved pursuant to the procedures under 26 U.S.C. § 6015. Indeed, those procedures provide a method for review of the tax liabilities themselves by the IRS Appeals Office and even the United States Tax Court. She is, instead, specifically bringing an action under 26 U.S.C. § 6015(e), the Declaratory Judgment Act, and the Administrative Procedure Act for declarations as to whether the IRS followed the mandatory statutory requirements of 26 U.S.C. § 6015(e)(1)(B) in continuing the levy process and seizing funds held with ICU after she filed a request for innocent spouse relief under 26 U.S.C. § 6015(f). She seeks a declaration, in other words, as to whether her *procedural* rights were violated while the innocent spouse process (which will determine the liability question) plays out separately. If every suit to protect such a specified procedural right could be converted into a suit that is, "at its heart," a suit over "whether [the taxpayer] is liable to pay the outstanding" tax merely because the government so contends (despite clear and precise pleadings that

[73] 28 U.S.C. § 2201.

[74] Dkt. No. 11, at 8.

indicate otherwise), it would render such statutory protections hollow, and would embolden the IRS to pay them little mind. Here, "[t]he IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority."[75]

But, the Declaratory Judgment Act permits courts to declare the rights and other legal relations of any interested party seeking a declaration, and it applies with equal force to all of the Defendants.[76] Although Plaintiff agrees with the government that the Declaratory Judgment Act has an exception for matters "with respect to Federal taxes," federal courts have held that this exception is "coterminous" with the Anti-Injunction Act's prohibition to restrain the assessment or collection of tax.[77] Here, Plaintiff's claims fall outside the federal tax exception of the Declaratory Judgment Act and the statutory text of the Anti-Injunction Act. ***First***, and most pointedly, the Anti-Injunction Act, 26 U.S.C. § 7421(a), begins as follows: "*Except as provided in section 6015(e) . . .*" These six words are dispositive and resolve the jurisdictional issue against the government. The Anti-Injunction Act—and thus the Declaratory Judgment Act—does not prohibit this suit, which was pled, and is, an action under 26 U.S.C. § 6015(e). The Anti-Injunction Act specially excepts this suit from its scope. Although the government may quibble with whether Ms. Lander's suit under 26 U.S.C. § 6015(e) is ultimately meritorious, that is a separate question from whether the Court has jurisdiction to make that determination.

Second, the United States Supreme Court has recognized a judicial exception to the Anti-Injunction Act, which would equally apply as an exception to the Declaratory Judgment Act's federal tax exception. Under this judicial exception, the government's sovereign immunity is waived if: (1) it

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[75] *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc).

[76] *See* 28 U.S.C. § 2201.

[77] *See, e.g., Cohen v. United States*,, 650 F.3d 717, 730-31 (D.C. Cir. 2011).

is clear that under no circumstances would the government ultimately prevail on the merits; and (2) equity jurisdiction exists.[78] For these purposes, equity jurisdiction exists where irreparable harm would occur absent the granting of equity relief because no adequate remedy exists at law.[79]

In Plaintiff's case, it is clear that under no circumstances would the government ultimately prevail on the merits. Specifically, the government violated the clear statutory prohibition on levy action under 26 U.S.C. § 6015(e)(1)(B)(i). Moreover, equity jurisdiction exists because Plaintiff would suffer irreparable harm absent the granting of equitable relief, and she has no other adequate remedy at law. Because the government violated the levy prohibition of 26 U.S.C. § 6015(e)(1)(B)(i) and seized substantially all of the funds held by Plaintiff, she was left unemployed and with little assets remaining to provide for her basic and necessary living expenses. In addition, Plaintiff has no other avenue to challenge the joint tax liability other than to wait a prolonged period of time until the IRS renders its final determination with respect to the innocent spouse claim, and if such determination is adverse, until the Tax Court renders a final decision on the matter. Notably, Plaintiff filed her innocent spouse claim with the IRS in December 2019, and the IRS has not reached a determination as of this filing, or approximately 6 months later. In the meantime, and as discussed above, Plaintiff continues to have no funds to provide for her basic and necessary living expenses absent a ruling from this Court.

Third, this Court has subject-matter jurisdiction over Plaintiff's Declaratory Judgment Act and Administrative Procedure Act claims because Plaintiff's lawsuit does not restrain the assessment or collection of tax.[80] Indeed, the government has already assessed the joint tax liabilities at issue in

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[78] *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

[79] *Id.* at 6-7; *see also Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990) (claims of financial destitution brought about by levy, coupled with evidence of inability to pay deficiency in order to bring refund suit, necessary to establish equity jurisdiction).

[80] *Cf. Cohen*, 650 F.3d 717; *see also Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1125 (2015) (reasoning that with respect to an analogous federal act, "a suit cannot be understood to 'restrain' the 'assessment, levy, or collection . . . if it merely inhibits those activities.").

this case. Moreover, and as conceded by the government in its Motion, collection action is already stayed until the IRS acts upon Plaintiff's innocent spouse claim.[81]

In sum, this Court has subject-matter jurisdiction to hear Plaintiff's claims under 26 U.S.C. § 6015(e), the Declaratory Judgment Act, and the Administrative Procedure Act.

C. This Court has Jurisdiction over Plaintiff's Claims under 28 U.S.C. § 1361.

The United States final contention is that the Court lacks subject-matter jurisdiction over Plaintiff's claims under 28 U.S.C. § 1361.[82] That provision provides that the "district court shall have original jurisdiction of any action in the nature of mandamus to compel and officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." "The legal duty . . . [owed] must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt."[83]

Where mandamus jurisdiction exists, a court may determine whether the plaintiff has stated a claim for mandamus relief, which the court may issue when: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) no other adequate remedy exists.[84] The Fifth Circuit has cautioned courts that, when determining whether to exercise mandamus jurisdiction under 28 U.S.C. § 1361, they "should be mindful to 'avoid tackling the merits under the ruse of assessing jurisdiction."[85] Instead, "the court must accept as true all nonfrivolous allegations of the complaint."[86]

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[81] Dkt. No. 11, at 7.

[82] Dkt. No. 11, at 9.

[83] *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997).

[84] *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011).

[85] *Id.* at 762-63.

[86] *Id.* at 763.

Plaintiff's Original Complaint requests mandamus relief under 28 U.S.C. § 1361.[87] In the Original Complaint, Plaintiff has alleged that she has a clear right to relief in that one or more of the Defendants failed to comply with a statute, 26 U.S.C. § 6015(e)(1)(B), which was a non-discretionary act. Moreover, Plaintiff has no other adequate remedy at law because the Defendants have failed to return the ICU funds to Plaintiff. For these reasons, Plaintiff has stated a cognizable claim for mandamus relief for which this Court has subject-matter jurisdiction.

II. Conclusion.

26 U.S.C. § 6015(e)(1)(B) prohibits the IRS from making, beginning, or prosecuting a levy action after an innocent spouse files a claim for relief under 26 U.S.C. § 6015(f). In this case, Plaintiff filed her request for innocent spouse relief within the 21-day holding period of 26 U.S.C. § 6332(c). Because the Government's own regulations provide that the "making" of a bank levy occurs after the expiration of the 21-day holding period, the IRS was prohibited from completing the levy process and seizing the ICU funds. Alternatively, even if the levy was made as of the moment the notice of levy was served upon ICU, the IRS was prohibited from "prosecuting" the levy action after Plaintiff filed her request for innocent spouse relief. Because in either case the government violated the levy prohibition period under 26 U.S.C. § 6015(e)(1)(B)(i), this Court has subject-matter jurisdiction over Plaintiff's claims under 26 U.S.C. § 6015(e)(1)(B)(ii). Moreover, for the reasons provided above, this Court has subject-matter jurisdiction over Plaintiff's remaining Declaratory Judgment and Administrative Procedure Act claims and mandamus claim under 28 U.S.C. § 1361. Thus, the government's Motion should be denied.

[87] Dkt. No. 1, ¶¶ 29-32.

Dated this 12 day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 12, 2020, opposing counsel was served with the following documents via the email address Michael.W.May@usdoj.gov: (1) Cathy Landers' Response in Opposition to the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction; and (2) Proposed Order.

/s/ Jason B. Freeman
Jason B. Freeman