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October 7, 2008

Molly Dwyer, Esquire
Clerk, U. S. Court of Appeals
for the Ninth Circuit
Filed via CM/ECF

Re: Susan B. Long v. United States Internal Revenue Service
(9th Cir. – No. 08-35672)

Dear Ms. Dwyer:

On October 3, 2008, we filed with your Court a letter seeking an expedited ruling on the IRS's pending motion for a stay pending final disposition of this appeal. As we will explain, we no longer seek an expedited ruling on our motion, but we are not withdrawing the motion.

As we stated in our October 3, 2008 letter, on October 1, 2008, the District Court denied the IRS's motion for a stay pending this Court's ruling on the motion filed in this Court. The District Court also ordered immediate compliance with its prior disclosure orders. In light of the District Court's most recent order, and in the absence of a ruling by this Court on our motion for a stay, the IRS determined that it had exhausted its remedies in its effort to protect confidential taxpayer return information from wrongful disclosure, and that it would comply with the District Court's orders despite having serious misgivings regarding the correctness of those orders.

Accordingly, we have been informed by attorneys familiar with this matter in the Office of IRS Chief Counsel that on October 6, 2008, the IRS sent to Long, for overnight delivery and in the PDF electronic format, unredacted Tables 37 and 38 through the August 2008 tables. The IRS's cover letter and a list of the documents produced are attached hereto. The IRS's standard practice is to make electronic disclosures in the PDF format, in order to protect the disclosed data from deletion or alteration. Because of that practice, the PDF tables were the only tables ready for immediate disclosure to Long. We note that in an October 3, 2008 e-mail to me, counsel

for Long requested that the tables not be in the PDF format, but instead in a different electronic format, such as Microsoft Word. I forwarded that e-mail to our contacts at the Office of Chief Counsel, and they have informed me that they are consulting with the IRS's disclosure personnel regarding how to proceed in light of that request. We also have been informed that Long already has requested the September 2008 tables, and we expect her requests to continue for the foreseeable future. Thus, neither this appeal nor our motion for stay are moot.

Consequently, the Government still seeks a ruling on its motion for a stay. As explained in our motion, we maintain that the District Court erred in ordering the IRS to disclose to Long Tables 37 and 38 without redacting the confidential return information contained in cells of one or two in those tables. We further maintain that the IRS has a statutory obligation to assert, and to protect from injury, the taxpayer privacy rights established by 26 U.S.C. § 6103. The IRS will continue to comply with the District Court's orders unless and until they are reversed on appeal, or our stay motion is granted by this Court. A stay by this Court, however, would end the potential harm caused by those ongoing disclosures.

Finally, Long's argument about "microdata files" in her response to our request to expedite neglects three points that will be further developed on brief, should the Solicitor General authorize this appeal. First, Congress specifically ordered the creation of the microdata files when it enacted 26 U.S.C. § 6108(a), a disclosure statute separate from § 6103, which is at issue in this litigation. Second, in 26 U.S.C. § 6108(c), Congress ordered that no disclosure of statistics "shall in any manner permit" the statistics "to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." Third, in obedience to Congress, the IRS uses various statistical techniques to provide useful information, while still protecting the privacy of unique taxpayers whose return information cannot be safeguarded by conventional aggregation. Thus, our example of posting on the internet either scanned images of income tax returns, or the same raw data in a tabular format, remains valid.

This case is assigned to me, and I can be reached at (202) 514-4339.

Sincerely yours,

/s/ Anthony T. Sheehan

ANTHONY T. SHEEHAN
Attorney
Appellate Section

Enclosure

cc (via CM/ECF):

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