UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOSEPH A. INSINGA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 9011-13W.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This is a "whistleblower" case brought under section 7623(b)(4) of the Internal Revenue Code (26 U.S.C.). By a previous order (Doc. 109) we granted in part petitioner's motions (Docs. 11, 19) to compel discovery from respondent, as to which respondent's compliance is due March 1, 2017 (see Doc. 156). Now before us is petitioner's motion (Doc. 138) to determine the sufficiency of respondent's responses to requests for admissions concerning two entities, referred to as "A, Inc.", and "V Inc.". Respondent opposed the motion (Doc. 152), and petitioner replied (Doc. 154). We will grant the motion in part and will otherwise deny it.

Background

I. Previous discovery dispute

Petitioner served document requests and interrogatories on respondent. (See Doc. 13, Ex. C.) Our order of July 27, 2016 (Doc.109), already requires respondent to--

> produce to petitioner, from IRS audit, Appeals, and collection records, any documents that have not already been produced that show any direct relation to the transactions that petitioner reported for each of the target taxpayers: A Inc., . . . [and] V Inc. . . . [R]espondent shall

include a sworn assurance, by one or more IRS employees with personal knowledge, that all responsive documents have been produced (or that such documents do not exist).

That order also already requires respondent to "give sworn answers to Interrogatories Nos. 2, 3, 12, and 13" regarding A, Inc. and V., Inc. (inter alia), i.e., to--

- state "whether the Respondent has taken any action, directly or indirectly, based upon the information or documentation provided by the Whistleblower" and to state "what direct or indirect action has been taken";

- "provide a written summary that explains how the Respondent used . . . any of the information or documentation provided to the IRS by the Petitioner in any newly initiated or existing investigation, audit, or collection proceeding, or used for any other purpose in any other proceeding";

- "[i]dentify all IRS team members associated with Agent Michael Rich in the investigation of any transaction associated with any of the taxpayers and/or transactions reported by Petitioner at any time since April 2, 2007. Please also state the date of the initiation of each such investigation, the nature of the investigation, and the details and results of each investigation"; and

- "[i]dentify any transaction reported by Petitioner in his submission of April 2, 2007, as amended, that was NEITHER investigated nor audited by the IRS at any time since that date."

As to Interrogatory No. 5, respondent is required to give a sworn answer with respect to A, Inc., and V Inc., as to any actions undertaken by the IRS since 2007 to collect any tax liability, including additions, subsequent to the petitioner's original submission with respect to each, stating whether or not such collection efforts were the result of any "administrative action" taken as a result of the information provided by the petitioner.

Compliance with that order is due by March 1, 2017.

II. Requests for admissions

After we issued our order of July 27, 2016, petitioner filed second and third requests for admissions (Docs. 112, 118), asserting facts about A, Inc., and V, Inc. These requests for admissions all concern the same subject matter--i.e., how respondent processed and used, to the extent that respondent did so, the information petitioner reported to the IRS's Whistleblower Office in April and May of 2007.

A. Requests pertaining to A, Inc. (Doc. 118)

By petitioner's characterization (which we accept for purposes of this order),

> the Requests for Admission pertaining to **A, Inc.** [i.e., the third request for admissions] were filed to elicit definitive and conclusive evidence, once and for all, that Respondent either did or did not use Petitioner's information and thereafter collect proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from such action (including any related actions) or from any settlement in response to such action.

Respondent's response (Doc. 126) included some admissions and some denials but also included some relevance objections, some responses that respondent "[c]annot truthfully admit or deny", and some assertions that section 6103 bars the disclosures that admission or denial of the requests would involve.

B. Requests pertaining to V, Inc. (Doc. 112)

Respondent filed his response to petitioner's second requests for admissions (Doc. 123). Those responses included some admissions and some denials, and those responses are not the subject of petitioner's motion. Respondent's response also included two other types of responses, which are the subject of petitioner's motion:

1. Unable to admit or deny. Requests 9, 12, 15, 16, 23, 30, 34, and 64, assert alleged facts about the timing and processing of petitioner's claim and of respondent's actions involving V, Inc. In his response to these, respondent stated that he "[c]annot truthfully admit or deny" these requests. In his opposition to the motion to determine sufficiency (Doc. 152 at 7), respondent explains, "The majority of the individuals identified in petitioner's requests retired several years

ago . . . or are no longer respondent's employees." (Different in kind, and apparently not a subject of the motion to determine sufficiency, is respondent's response to request 24, in which he states he is unable to "admit or deny that this email is a record of regularly admitted activity because respondent does not have this email in its records and cannot otherwise independently verify its authenticity.")

2. Section 6103. Requests 65-68 ask respondent to admit that--

- "after the adjustment, assessment and settlement in 2010 of the V Inc. taxes for the years 2005-2006, V Inc. amended its tax return for the tax year 2007 to remove the deductions for discount fees and interest relating to the V Inc. accounts receivable transaction."

- "the amendment of the V Inc. tax return described in Request for Admission #65 resulted in the payment of additional tax."

- "after the adjustment, assessment and settlement in 2010 of the V Inc. taxes for the years 2005-2006, V Inc. amended its tax return for the tax year 2008 to remove the deductions for discount fees and interest relating to the V Inc. accounts receivable transaction."

- "the amendment of the V Inc. tax return described in Request for Admission #67 resulted in the payment of additional tax."

In response to requests 65-68, respondent objected on the ground that section 6103 bars the disclosures that admission or denial of the requests would involve, and on the ground that the request is "overly broad and unduly burdensome to the extent that it seeks the identification and disclosure of information that is irrelevant or immaterial".

C. Petitioner's motion

On October 28, 2016, petitioner filed his motion (Doc. 138) to determine the sufficiency of respondent's answers and objections to petitioner's second and third requests for admissions ("the motion"). Respondent filed a response (Doc. 152) to the motion; and petitioner filed a reply (Doc. 154).

Discussion

I. Cooperation under Rule 90(a)

Rule 90(a) permits a party to serve requests for admissions but states, "the Court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule." Respondent contends that petitioner's requests for admissions were improper because petitioner has not complied with this instruction. Petitioner argues that he has complied and sets out the parties' course of correspondence. We do not hold that petitioner has failed to comply with Rule 90(a).

II. Premature requests

However, in the context of this case, we think that the requests as to A, Inc. (see part II.A above), and as to the amended returns filed by V, Inc. (see part II.B.2 above), were premature, in view of our order of July 27, 2016, and respondent's ongoing compliance therewith, due March 1, 2017.

We have ordered respondent to make a thorough disclosure of "documents that have not already been produced that show any direct relation to the transactions that petitioner reported for . . . A Inc., . . . [and] V Inc. . . ." and a description of "what direct or indirect action has been taken" in response to petitioner's information. We assume that respondent will comply with our order. It may well be that, in so complying, respondent either will provide by other means the information that is sought by the requests for admission or will render those requests moot. We do not see the point in ordering further responses at this time.

III. Section 6103

Since we otherwise deny petitioner's motion as to the requests for which respondent raised objections under section 6103, we do not need to resolve the parties' current dispute as to section 6103. However, in view of his ongoing compliance with our prior order, we warn respondent against an unduly narrow construction of subparagraph 6103(h)(4)(B), which provides that return information may be disclosed in a Federal judicial proceeding pertaining to tax administration "if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding". That non-disclosure

exception applies to whistleblower proceedings. Cf. 26 C.F.R. sec. 301.6103(h)(4)-1(a) (applicable to administrative proceedings, effective for information submitted on or after August 12, 2014, and for claims for awards that are open as of August 12, 2014). If, by way of hypothetical example, a whistleblower informed the IRS of a Year 1 transaction by Taxpayer, and if the IRS thereafter came to an explicit understanding with Taxpayer that included Taxpayer's filing of amended returns for Years 2 and 3 and its payment of tax for those years, we know of no reason (and respondent has not suggested any) that such payments might not constitute "collected proceeds" for purposes of section 7623(b).

IV. Inability to admit or deny

Petitioner's requests for admissions 9, 12, 15, 16, 23, 30, 34, and 64, assert alleged actions taken by or facts knowable to IRS personnel, with respect to petitioner's claim as to V., Inc. Respondent says he is unable to admit or deny the facts because the relevant personnel are retired--but respondent has not described any efforts he has taken to try to obtain information from these retirees.

Our order of July 27, 2016, denied petitioner's request to take depositions to which respondent did not consent. Our order explained:

> Rule 74(c)(1)(B) . . . makes clear that a non-consensual deposition "is an extraordinary method of discovery" that is only available where the witness can give testimony that could not be obtained through document discovery. . . . A whistleblower's desire for additional information about the rejection of his claim is not an extraordinary circumstance that, without more, would justify nonconsensual depositions in this Court.
>
> However, this feature of our rules can, and in this case does, warrant granting latitude to a party's use of the other tools of discovery . . . . Unless the document production and sworn interrogatory responses prove to be inadequate means of discovery, non-consensual depositions should be denied.

We have thus confined petitioner to discovery methods other than depositions, on the supposition that respondent will fairly respond to petitioner's discovery requests. Since locating IRS retirees and obtaining their cooperation is surely easier for respondent than it would be for petitioner, we think respondent should

have undertaken such efforts, especially in light of our prior order. Under Rule 90(c), an assertion that a requested admission "cannot be truthfully admitted or denied" must "set[] forth in detail the reasons why this is so", and that detail is lacking in respondent's responses.

We will therefore require respondent to file responses that comply with Rule 90. Those responses either should be outright admissions or denials or should set forth in detail respondent's attempts to get sufficient information in order to be able to respond. (Or, if petitioner's assertion is plausible, if respondent thinks the assertion is not outcome-determinative, and if finding the answer is more trouble than respondent thinks it would be worth, respondent could offer to stipulate the asserted fact for purposes of this case only.)

It is therefore

ORDERED that petitioner's motion to determine sufficiency (Doc. 138) is granted in part, in that respondent is required to file, no later than March 1, 2017, supplemental responses to requests 9, 12, 15, 16, 23, 30, 34, and 64 in petitioner's second request for admissions (Doc. 112). It is further

ORDERED that petitioner's motion to determine sufficiency is otherwise denied. It is further

ORDERED, in view of petitioner's status report (Doc. 160) that, no later than March 10, 2017, the parties shall cooperate in scheduling a telephone conference in this case with the help of the Chambers Administrator of the undersigned judge. It is the Court's expectation that, by the time of the conference, the parties will be able to state their positions as to whether respondent has complied with this order and the Court's order of July 27, 2016, and as to the most efficient routine for further proceedings in this case.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
January 27, 2017