UNITED STATES TAX COURT
WASHINGTON, DC 20217

WHISTLEBLOWER 972-17W,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 972-17W.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This whistleblower action was commenced pursuant to section 7623(b)(4).[1] By Order dated January 17, 2018, the Court directed the parties to attempt to stipulate to the administrative record. The parties subsequently reported to the Court that they are unable to stipulate to the administrative record.

By Order dated April 27, 2018, the Court directed respondent to file the administrative record as compiled by the Whistleblower Office. On May 17, 2018, petitioner filed a motion for leave to conduct discovery.[2] On June 11, 2018, respondent filed a response opposing petitioner's motion, and on June 20, 2018, petitioner filed a reply to respondent's response.

On June 25, 2018, petitioner's motion for leave to conduct discovery was called for hearing in Washington, D.C. Counsel for both parties appeared and were heard.

---

[1]All section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[2]Attached as exhibits to petitioner's motion are petitioner's proposed interrogatories, request for production of documents, and proposed depositions.

SERVED Jul 09 2018

Background

The administrative record as compiled by the Whistleblower Office (administrative record) shows that petitioner received a letter from an IRS Revenue Officer (RO-1) requesting that petitioner attend a meeting on February 20, 2008, and produce bank and other corporate records related to petitioner's potential liability as an officer and employee of a corporation (corporation 1). Corporation 1 had failed to pay employment taxes for the final quarter of taxable year 2006 and for all four quarters of taxable year 2007. Petitioner met with RO-1 as requested.

The administrative record includes an affidavit executed by petitioner on October 5, 2015, which states that petitioner informed RO-1 that three individuals (taxpayers 1, 2, and 3) "had been manipulating various companies that they controlled (including [corporation 1])". Petitioner further stated in the affidavit that RO-1 informed petitioner about the IRS Whistleblower program. Petitioner stated that in subsequent meetings with RO-1 and an IRS Special Agent (SA-1), petitioner was informed that RO-1 and SA-1 "would be handling the investigation" of taxpayers 2 and 3. In addition, petitioner was provided with contact information for another IRS Special Agent (SA-2) and was encouraged to share information about taxpayer 1 with SA-2. Petitioner allegedly had several meetings with SA-2 and provided SA-2 with a chart (apparently printed on June 18, 2008) identifying numerous individuals and corporations related to taxpayer 1.

On July 1, 2008, the IRS Whistleblower Office received a Form 211, Application for Award for Original Information, executed by petitioner on June 27, 2008. In a letter attached to the Form 211, petitioner identified seven individuals (including taxpayers 1, 2, and 3 mentioned above) and stated that petitioner and an associate were submitting the Form 211 to disclose information about Federal tax evasion schemes carried out by the group. The letter states that considering "the amount of information we wish to share and the volume of paper in our possession, we request that an investigative discussion be scheduled".

The administrative record indicates that after petitioner's initial meetings with IRS agents and the submission of petitioner's Form 211, the IRS either continued or initiated significant actions against taxpayers 1, 2, and 3, as described below.[3]

[3]At the hearing of this matter, the parties reported that they are now in agreement that the IRS took no action in respect of the four remaining taxpayers

Taxpayer 1 was the president of corporation 1. It appears that the IRS continued a criminal investigation of taxpayer 1 (which had recently been reinstated in 2007). SA-2 executed a Form 11369, Confidential Evaluation Report on Claim for Award, on September 13, 2010, regarding petitioner's claim regarding taxpayer 1. The Form 11369 indicates in relevant part that criminal investigators received a "Collection Referral relative to [taxpayers 1 and 2] on or about July 2008 relative to payroll tax liabilities of [corporation 1]", that SA-2 had determined that taxpayer 1 had received millions of dollars in unreported dividends from corporation 2 (also controlled by taxpayer 1), and that in February 2009 a criminal investigation was opened as to taxpayer 2 in part to review his failure to report income that he had received from corporation 1. SA-2 stated that all information was developed by the IRS independent of any information provided by petitioner. In 2013, taxpayer 1 was convicted of tax-related crimes including failing to file personal and corporate tax returns that were due to be filed in 2006, 2007, and 2008. Taxpayer 1 was ordered to pay restitution of $37.8 million.

Taxpayer 2 was the chief financial officer of corporation 1. A Form 11369 executed on May 2, 2013, by the Revenue Officer who had conducted an examination of taxpayer 2 (RO-2), stated in relevant part that RO-1 had determined as part of an employment tax collection case regarding corporation 1 that taxpayer 2 had received approximately $13,000 per month from corporation 1 in taxable year 2006 but failed to include those payments in taxable income, taxpayer 2 had not filed an income tax return for 2007, RO-1 referred taxpayer 2 to IRS criminal investigators, and after being interviewed by an IRS Special Agent taxpayer 2 filed an amended income tax return for 2006 reporting additional income from corporation 1 and an income tax return for 2007, leading to the termination of the criminal investigation.

The Form 11369 indicates that RO-1 assessed trust fund recovery penalties against taxpayer 2 for the final quarter of taxable year 2006 and all four quarters of taxable year 2007. The Form 11369 includes statements that RO-1 had discovered taxpayer 2's unreported income for the taxable year 2006 and that petitioner's information was not useful in an examination of taxpayer 2's tax returns for the taxable years 2009 and 2010.

---

identified in petitioner's Form 211 and that they intend to memorialize that agreement in a stipulation of settled issues to be filed with the Court at a later date.

The administrative record indicates that taxpayer 2 filed amended Federal income tax returns for the taxable years 2005 and 2006 in March 2009 and filed delinquent Federal income tax returns for the taxable years 2007 and 2008 in July 2010. The administrative record further indicates that the IRS filed Federal tax liens against taxpayer 2 to collect trust fund recovery penalties of approximately $657,000 and income tax liabilities of $75,000 for the taxable years 2005 and 2006.

Taxpayer 3 apparently was an associate of taxpayers 1 and 2 and had some indirect connection with corporation 1. A Form 11369 executed by RO-2 on October 9, 2010, states that taxpayer 3 was never the subject of a criminal investigation. That statement is inconsistent with information provided by Senior Tax Analyst Felipe Castellanoz in a Whistleblower Office memorandum dated December 5, 2016. The Form 11369 states that taxpayer 3 was not under civil examination until petitioner's Form 211 was received and processed, that RO-1 "secured delinquent returns for years 2003-2011", and that taxpayer 3's tax returns for the taxable years 2009 and 2010 were forwarded to RO-2 for "a limited scope audit". The Form 11369 further states that petitioner's information (that taxpayer 3 had failed to report income from consulting activities from 1999 through 2007) was not helpful to the IRS. The administrative record indicates that the IRS filed tax liens against taxpayer 3 for unpaid Federal income taxes totaling approximately $2.4 million for the taxable years 2003 to 2011.

Discussion

I. The Administrative Record

Petitioner seeks discovery with the aim of supplementing the administrative record. Petitioner contends that the administrative record as compiled by the Whistleblower Office is incomplete and precludes effective judicial review of the determination by the Whistleblower Office to disallow petitioner's claim for an award.

Respondent maintains that petitioner should not be permitted to conduct discovery because the administrative record as compiled by the Whistleblower Office is the only information that was taken into account in the determination to deny petitioner's whistleblower claim. Citing Kasper v. Commissioner, 150 T.C. No. 2 (Jan. 9, 2018), respondent asserts that the scope of review in whistleblower cases is limited to the administrative record and that petitioner has failed to establish an exception to the so-called record rule.

The administrative record in a whistleblower case normally is expected to include "all information provided by the whistleblower (whether provided with the whistleblower's original submission or through a subsequent contact with the IRS"). Sec. 301.7623-3(e)(2)(i), Proced. & Admin. Regs. In accordance with the Court's holding in Whistleblower 21276-13W v. Commissioner, 144 T.C. 290 (2015), information that petitioner provided to IRS operating divisions before petitioner submitted Form 211 to the Whistleblower Office likewise is relevant to petitioner's claim for an award.

The Court's review of the administrative record shows that it contains very little information, other than petitioner's Form 211, identifying or describing the specific information that petitioner provided to the IRS. While the administrative record indicates that petitioner had multiple meetings and informal contacts with various IRS agents involved in the investigations and examinations of taxpayers 1, 2, and 3, and corporations 1 and 2, described above, there are few records of the dates of petitioner's meetings and virtually no documents describing the nature and scope of the information that petitioner provided to the IRS agents in question.

It is well established that the Commissioner cannot unilaterally decide what constitutes the administrative record in a whistleblower action. Whistleblower One 10683-13W v. Commissioner, 145 T.C. 204, 206 (2015), and cases cited thereat. Among recognized exceptions to the record rule are cases in which the administrative record is incomplete to a degree that precludes effective judicial review. See, e.g., Commercial Drapery Contractors, Inc. v. U.S., 133 F.3d 1, 7 (D.C. Cir. 1998). The Court agrees with petitioner that the administrative record is materially incomplete and, therefore, the circumstances justify a limited departure from the strict application of the record rule.

II. Petitioner's Discovery Requests

Section 7623 provides for awards to individuals who provide information to the Secretary about third parties who fail to comply with the internal revenue laws. Section 7623(b) provides: "If the Secretary proceeds with any administrative or judicial action * * * based on information brought to the Secretary's attention by an individual, such individual shall * * * receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action." In sum, a whistleblower's entitlement to an award depends on (1) whether there was a collection of proceeds and (2) whether that collection was attributable at least in part to the information that the whistleblower provided to the IRS

Paragraph (b) of Rule 70 governing discovery in Tax Court proceedings states that the scope of discovery includes any nonprivileged matter that is relevant to the subject matter involved in the pending case. The paragraph further provides: "It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence." The standard of relevancy in a discovery action is liberal. See Rosenfeld v. Commissioner, 82 T.C. 105, 112 (1984). In Whistleblower 11099-13W v. Commissioner, 147 T.C. 110 (2016), the Court held: "Once the discovering party makes some minimal showing of the relevance of the information or response sought to the subject matter involved in the pending case, the party opposing production of information has the burden of establishing that the documents sought by the other party are not relevant or otherwise not discoverable." Id. at 119-120.

Petitioner has met this minimal showing in the light of the Court's conclusion that the administrative record is materially incomplete and precludes effective judicial review. Some of the information and responses petitioner seeks is clearly relevant to petitioner's assertion that the information petitioner provided to IRS agents at various stages of civil examinations and criminal investigations of taxpayers 1, 2, and 3 led to the assessment and collection of taxes justifying an award under section 7623(b).

Respondent does not deny petitioner's factual allegations, nor does he argue that the information sought would be irrelevant to the question whether petitioner's information led to the assessment and collection of taxes from taxpayers 1, 2, and 3. Respondent has failed to carry his burden that the information petitioner seeks should not be produced.

Accordingly, we shall grant in part petitioner's motion to conduct discovery pursuant to Rule 70(a)(2), as described more fully below.[4]

[4]While the Court will permit petitioner to proceed with limited discovery, the Court encourages the parties to continue to informally exchange documents with the objective of identifying the status of any investigations or examinations of the taxpayers identified by petitioner, as of the date that petitioner first spoke with RO-1, and with the aim of attempting to arrive at a basis for settlement of this case.

A. Interrogatories

Petitioner's interrogatories Nos. 1, 5, and 7 pertain to conversations, whether in person, telephonic, or otherwise, that RO-1, SA-1, and SA-2 had with petitioner, including the dates, subject matter, lengths, and names of other IRS agents present during any of the conversations. Respondent's responses to these interrogatories should help clarify the information that petitioner provided to IRS agents and when that information was provided. Accordingly, respondent shall respond to petitioner's interrogatories Nos. 1, 5, and 7.

B. Request for Production of Documents

Petitioner's request for production of documents Nos. 1 and 2 request all notes and records of meetings that RO-1, SA-1, and SA-2 had with petitioner that were taken during and/or after each meeting, including any record of time, place, and subject matter of the meetings. Respondent's production of these documents should help clarify what information petitioner provided to IRS agents and when that information was provided. Accordingly, respondent shall respond to petitioner's requests Nos. 1 and 2.

C. Requests for Depositions

Petitioner seeks nonconsensual depositions of nonparty witnesses, RO-1, SA-1, SA-2, and a Whistleblower Office analyst in the event that respondent is unable to provide responses to interrogatories or requests for production of documents.[5] Because we will direct respondent to respond to petitioner's interrogatories and requests for production of documents as outlined above, it is premature to consider a request for a nonconsensual deposition at this time.

Upon due consideration and for cause, it is

[5]Rule 74(c)(1)(B) makes clear that a nonconsensual deposition "is an extraordinary method of discovery" that is only available where the witness can give testimony that could not be obtained through other forms of discovery.

ORDERED that petitioner's motion for leave to conduct discovery, filed May 17, 2018, is granted in that, on or before August 17, 2018, respondent shall respond to petitioner's interrogatories and request for production of documents as set forth more fully in this Order.

(Signed) Daniel A. Guy, Jr.
Special Trial Judge

Dated: Washington, D.C.
July 9, 2018