

VACATED & SET ASIDE

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided. **RMM**

UNITED STATES TAX COURT WASHINGTON, DC 20217

WHISTLEBLOWER 11099-13W,)
)
Petitioner(s),)
)
v.) Docket No. 11099-13W.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

This is a case brought under Internal Revenue Code section 7623(b)(4), appealing respondent's determination not to make a so-called whistleblower award to petitioner for information he provided that he alleges led to the recovery of incremental taxes and other amounts. Respondent has moved for summary judgment in his favor (motion) that his Whistleblower Office did not abuse its discretion in denying petitioner an award. In support of the motion, respondent relies on the pleadings, the declaration of one of his employees, Steven J. Mitzel, and an exhibit attached to the declaration. Mr. Mitzel declares that the exhibit is a true and correct copy of the documents comprising the Whistleblower Office's administrative claim file in this case. Petitioner has filed a memorandum of law in opposition to the motion, and respondent has replied to the memorandum.

Recently, in Kasper v. Commissioner, 150 T.C. __ (January 9, 2018), we addressed both the scope and standard of our review of whistleblower award determinations. We said that we look to the Administrative Procedure Act (APA)¹ for both the scope of review (i.e., what evidence may we consider), id. at __, __ (slip op. at 16, 20) and the standard of review (i.e., what deference we give the determination), id. at __ (slip op. at 22). We said that in reviewing award determinations we would limit the scope of our review to the administrative record. Id. at __ (slip op. at 20). In other words, we would apply what is commonly known as the "record rule". See id. at __ (slip op. at 10). We described the

¹APA secs. 551-559, 701-706 (2012).

appropriate standard of review as the APA section 706(2)(A) abuse-of-discretion standard. Id. at __ (slip op. op.at 22).²

Subsequent to respondent filing the motion, the parties have made numerous motions concerning the record for review and other evidentiary matters. Petitioner has made a trio of motions to (1) supplement the administrative record, (2) admit deposition testimony, and (3) determine the scope of the administrative record. Respondent has also made a trio of motions, to (1) exclude the report and any testimony of an expert petitioner wishes to call, (2) exclude any testimony by former Whistleblower Office Program Manager Robert Gardner, and (3) exclude witness testimony and documents outside of the scope of the administrative record.

Moreover, petitioner has filed a pretrial memorandum, in which he states his disagreement with our holdings in Kasper as to the scope and standard of review for whistleblower award determinations, and he urges us to reconsider our holdings (including that he is entitled to a trial de novo because the record rule does not govern the scope of our review in whistleblower cases).

Rule 121, Tax Court Rules of Practice and Procedure, addresses summary judgment and, in relevant part, states that summary adjudication is appropriate if "there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." In a judicial action under the record rule, a material fact is the contents of the administrative record. See, e.g., Martucci v. Hartford Life Ins. Co., 863 F. Supp. 269, 274 (S.D. NY 2012) ("The parties do not dispute the contents of the administrative record, so there is no genuinely disputed issue of material fact at hand."). There is a genuine dispute as to the contents of the administrative record (see, e.g., petitioner's motion to determine the scope of the administrative record). We shall deny the motion because there is a genuine dispute as to a material fact. See Rule 121(b).

We shall order the parties to respond to the various motions described supra, and, if petitioner wishes to move for partial summary judgement with respect to his challenge to Kasper, he should do so expeditiously.

²APA sec. 706(2)(A) directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

On the premises stated, it is

ORDERED that the motion is denied. It is further

ORDERED that, on or before January 11, 2019, respondent shall respond separately to petitioner's motions to (1) supplement the administrative record, (2) admit deposition testimony, and (3) determine the scope of the administrative record. It is further

ORDERED that, on or before January 11, 2019, petitioner shall respond separately to respondent's motions to (1) exclude the report and any testimony of an expert petitioner wishes to call, (2) exclude any testimony by former Whistleblower Office Program Manager Robert Gardner, and (3) exclude witness testimony and documents outside of the scope of the administrative record. It is further

ORDERED that, on or before January 11, 2019, petitioner shall file any motion for partial summary judgment challenging our holdings in Kasper. It is further

ORDERED that, if petitioner so moves, respondent shall respond in writing on or before February 11, 2019.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
December 6, 2018