UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

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] Petitioner challenges a final determination of the Internal Revenue Service (IRS) Whistleblower Office (WBO) that, although the IRS reviewed information that petitioner provided as part of an investigation of three taxpayers, petitioner's information did not result in the assessment of additional tax, penalties, interest or additional amounts related to the issues that petitioner identified.

Pending before the Court is petitioner's motion to compel discovery. Respondent opposes petitioner's motion. As discussed in detail below, the Court will direct the parties to show cause, in writing, why this case should not be remanded to the WBO for further administrative proceedings.

Background

On May 8, 2018, respondent filed with the Court the administrative record as compiled by the WBO (administrative record). That record shows that petitioner received a letter from an IRS Revenue Officer (RO-1) requesting that petitioner attend a meeting in February 2008, and produce bank and other corporate records related to petitioner's potential liability for so-called trust fund taxes as an officer and employee of a corporation (corporation 1). Petitioner met with RO-1 as requested.

[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.

SERVED May 15 2019

The administrative record includes an affidavit executed by petitioner, 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 (1) RO-1 informed petitioner about the IRS Whistleblower program; (2) petitioner attended additional meetings with RO-1 and an IRS Special Agent (SA-1); (3) petitioner was informed that RO-1 and SA-1 "would be handling the investigation" of taxpayers 2 and 3; and (4) 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 and graphs identifying individuals and corporations related to taxpayer 1.

On July 1, 2008, the WBO received from petitioner a Form 211, Application for Award for Original Information. In a letter attached to the Form 211, petitioner identified taxpayers 1, 2, and 3, and stated that petitioner and another individual intended to disclose information about Federal tax evasion schemes carried out by the group. The letter stated 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 provides little detail about the dates and times that petitioner met with or spoke to various IRS agents, how and when petitioner was introduced to SA-1 and SA-2, or the nature and extent of the information that petitioner provided to the IRS about tax-avoidance activities of taxpayers 1, 2, and 3. The administrative record indicates, however, that after the submission of petitioner's Form 211, the IRS either continued or initiated significant actions against taxpayers 1, 2, and 3. Other than the statements contained in petitioner's affidavit summarized above, petitioner apparently has few records (i.e., notes, calendars, or histories) detailing any interactions with the IRS.

In an Order dated July 9, 2018, the Court summarized relevant portions of the administrative record and concluded that the record did not allow for effective judicial review of the determination of the WBO denying petitioner's claim for an award. See, e.g., Commercial Drapery Contractors, Inc. v. U.S., 133 F.3d 1, 7 (D.C. Cir. 1998). Consequently, the Court granted petitioner's motion for leave to conduct discovery and directed respondent to provide responses to a limited number of petitioner's interrogatories and requests for production of documents. The Court's objective in approving this limited discovery was to attempt to clarify

the nature, scope, and timing of the information that petitioner provided to the IRS and how (if at all) that information was used by the IRS.

Respondent complied with the Court's Order and provided petitioner with answers to specific interrogatories and produced documents, which are summarized as follows:

RO-1

RO-1 first met with petitioner on February 27, 2008. RO-1's case activity notes of that meeting offer no indication that petitioner provided any specific information related to tax-avoidance activities of taxpayers 1, 2, or 3.

RO-1 met with petitioner again on June 13, 2008. RO-1's case activity notes of that meeting state in relevant part:

> Met with FTA[-1] re: referral potential for [taxpayers 1 and 2]. [Petitioner] * * * wants to provide me with information to show that [taxpayers 1 and 2] are committing fraud and not reporting at least $11-million in income. I discussed with FTA[-1] who advised me to provide information on recently implemented whistleblower procedures & not to accept any records from [petitioner]. I printed Notice 2008-4 whistleblower procedures, and Form 211 and gave to [petitioner]. Advised him to send them any information he may have.

RO-1's case activity notes further indicate that petitioner:

> --mentioned that he was acquainted with another person with information about taxpayer 1 and that taxpayer 1 was likely to file a bankruptcy petition on behalf of a company that he controlled;
>
> --placed a phone call to RO-1 on July 8, 2008, to report that petitioner and another individual had forwarded Forms 211 to the WBO and that RO-1 informed petitioner that "I cannot discuss matter with him";
>
> --placed a phone call to RO-1 on February 9, 2009, and stated that taxpayer 2 might be employed as a special litigation consultant in a bankruptcy proceeding for a corporation related to taxpayers 1 and 2. RO-1 noted that taxpayer 2 "will be compensated $250/hour, and

[taxpayer 2's] resume was attached. Forwarded this document to [SA-3]."

In response to petitioner's interrogatories, RO-1 stated that, in addition to the two meetings with petitioner summarized above, petitioner made unsolicited phone calls and visits to RO-1's business office, after the examination of corporation 1 had been closed, and he offered information about taxpayers 1, 2, and 3. RO-1 did not recall making any notes of these visits or any details about the information petitioner provided, but did recall that any documents that petitioner provided were promptly shredded. RO-1 did not explain these actions or whether the WBO was aware that the documents petitioner offered were destroyed.

SA-1

In response to petitioner's interrogatories, SA-1 acknowledged meeting with petitioner and SA-2 on June 30, 2010, concerning taxpayer 2 and that petitioner called SA-1 on July 1, 2010, and provided contact information for several individuals. SA-1 took notes of the June 30, 2010, meeting and those notes are included in the administrative record.

SA-1 states that the criminal investigation of taxpayer 2 was "abandoned by CI" on April 5, 2010. The administrative record does not explain why petitioner would have been interviewed on June 30, 2010, after the criminal investigation of taxpayer 2 had purportedly been abandoned nearly three months earlier.

SA-1 also reported that the criminal investigation file for taxpayer 2 was destroyed on October 1, 2016--a development that was attributed to the entry of an incorrect retention code signaling that the file should be retained for five years as opposed to the correct 20-year retention period.

SA-2

In response to petitioner's interrogatories, SA-2 acknowledged meeting with petitioner and SA-1 in June 2010 concerning taxpayer 2. SA-2 did not take notes of that meeting.

SA-2 stated that petitioner made unsolicited phone calls and visits to SA-2's business office and on a number of occasions gave documents to SA-2 which were retained in the investigative file for taxpayer 1 and which were provided to petitioner in response to a request for production of documents. The Court has

reviewed those documents and finds that the majority of the documents relate to various corporations that taxpayer 1 apparently controlled. Notably, two pages of undated, handwritten notes, which appear to be SA-2's notes (at bates Nos. 516-517), include petitioner's name and phone number, refer to a corporation controlled by taxpayer 1, and appear to refer to an "$18M bonus-No income taxes." In addition, the record includes copies of the front and back of a check (at bates Nos. 674-675), payable from one corporation (apparently controlled by taxpayer 1) to corporation 1.

Petitioner's Motion to Compel Discovery

On November 2, 2018, petitioner filed a motion to compel discovery asserting that respondent's answers to interrogatories and production of documents leave more questions than answers, reveal significant gaps in the administrative record, and show that petitioner provided information to the IRS that was not disclosed to the WBO. Petitioner requests that the Court direct respondent to supplement the answers to interrogatories with more complete responses and direct the parties take the depositions of SA-1, SA-2, and petitioner.

Respondent filed a response in opposition to petitioner's motion. Respondent asserts in pertinent part that the depositions that petitioner proposes are unwarranted and that if petitioner requires additional information petitioner should simply send additional discovery requests to respondent in accordance with the Court's rules.

Discussion

Section 7623(b)(1) mandates the payment of an award if the IRS "proceeds with an administrative or judicial action" to collect taxes "based on information brought to the Secretary's attention by an individual". Petitioner's entitlement to an award turns on two issues: first, whether there was a collection of proceeds; and second, whether that collection was attributable to the IRS's proceeding with administrative or judicial action on the basis of petitioner's information. See Whistleblower One 10683-13W v. Commissioner, 145 T.C. 204, 206 (2015).

Respondent issued a final determination to petitioner stating that petitioner's claim was recommended for denial on the ground that petitioner's information did not result in the assessment of additional tax, penalties, interest or additional amounts.

The Court held in Kasper v. Commissioner, 150 T.C. 8, 20 (2018), that when reviewing the Commissioner's determinations under section 7623(b) we will limit the scope of our review to the administrative record. The administrative record in a whistleblower case normally is expected to include, among other items, "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, 305-306 (2015), information that petitioner provided to IRS operating divisions before petitioner submitted Form 211 to the WBO likewise is relevant to petitioner's claim for an award.

As a general rule, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). An agency may not unilaterally determine the contents of the administrative record that a court may review. As the Supreme Court stated in In re United States, 138 S.Ct. 371, 372 (2017) (quoting Thompson v. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original):

> The whole administrative record * * * is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record.* * * The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.

In Kasper v. Commissioner, 150 T.C. at 21, we held that the administrative record in a whistleblower case may be supplemented if it is incomplete. As the Supreme Court stated in Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985):

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

See also County of Los Angeles v. Shalala, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

We recently held in Whistleblower 769-16W v. Commissioner, 152 T.C. __ (Apr. 11, 2019), that this Court may remand a whistleblower case in appropriate circumstances. As noted above, there is little in the administrative record that identifies or describes the specific information that petitioner provided to the IRS regarding tax-avoidance activities of taxpayers 1, 2, and 3. The Court agrees with petitioner that respondent's responses to the limited discovery permitted by the Court have generated more questions than answers and reveal gaps in the administrative record.

The Court is unable to determine on the record presented whether the IRS proceeded with an administrative or judicial action using the information that petitioner provided and collected proceeds using petitioner's information. See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. at 744. Under the circumstances, rather than permit further discovery, the Court will direct the parties to show cause why this case should not be remanded to the WBO for further investigation and development of the administrative record. The parties shall include in their responses a comprehensive list of the matters that the WBO should be required to address as part of the remand process and a proposed time line for the completion of those proceedings.

Upon due consideration and for cause, it is

ORDERED that petitioner's motion to compel discovery, filed November 2, 2018, is hereby held in abeyance. It is further

ORDERED that, on or before July 2, 2019, the parties shall show cause, in writing, why the Court should not remand this case to the WBO for further development of the administrative record, including therein a comprehensive list of the matters that the WBO should be required to address as part of the remand process and a proposed time line for the completion of those proceedings.

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

Dated: Washington, D.C.
May 15, 2019