

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

UNITED STATES TAX COURT
WASHINGTON, DC 20217

CLC

LOYS VALLEE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 13513-16W.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This is an action pursuant to 26 U.S.C. section 7623(b)(4), in which petitioner Loys Vallee asks the Court to review the denial by the Internal Revenue Service (“IRS”) of his claim for a whistleblower award. On July 31, 2018, we issued an Order (Doc. 52) requiring the Commissioner to file what he contends constitutes the complete administrative record, and the Commissioner’s response to Mr. Vallee’s challenge concerning the completeness of the administrative record. (Doc. 52 at 11).

On August 30, 2018, the Commissioner filed his response to our Order (Doc. 53), and he also filed what he contends is the entire administrative record (Doc. 55). On September 24, 2018, Mr. Vallee filed his response to our Order (Doc. 57), and filed a document titled, “Response to the Commissioner’s Filing of the Contended Administrative Record” (Doc. 58). For the reasons set forth below, we will remand this case to the Whistleblower Office (“WBO”) for further consideration and for further development of the administrative record.

Background

On July 18, 2017, Mr. Vallee filed a motion to compel production of documents (Doc. 14). On August 1, 2017, the Commissioner filed a motion for summary judgment (Doc. 18).

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Mr. Vallee filed his motion to compel production of documents because he believes that the information he submitted to the WBO was distributed to IRS employees for whose actions the WBO failed to account, and that those employees may have used his information in an audit. With respect to the Commissioner's motion for summary judgment, which undertook to show that no audit was conducted on the basis of Mr. Vallee's information, we previously observed in our Order, *inter alia*, that "the Commissioner filed declarations for the apparent purpose of showing the limited number of IRS personnel who had access to Mr. Vallee's Form 211 information." (Doc. 52 at 7-8). We noted, however, that the Commissioner had not filed a declaration by every individual who apparently had access to Mr. Vallee's information, and that the declarations that the Commissioner did file failed to discuss whether any other person could have accessed or did access Mr. Vallee's Form 211 information. We previously articulated that, in two of the three declarations the Commissioner did file, we perceived a possible defect in that they failed to state that the declarant "did not forward any of petitioner's Form 211 information to any other' group or person than those stated in the declaration * * *." (Doc. 52 at p.11).

The Court's Order, dated July 31, 2018

We noted in our Order dated July 31, 2018, that Mr. Vallee made one allegation "with a level of specificity and citation to supporting documents not employed in some of his other arguments, that after receiving his Form 211, the IRS initiated a surreptitious examination of taxpayers identified in his Form 211 * * * ." (Doc. 52 at 5). We construed his more specific arguments as "supplementing his motion to compel production of documents." (Doc. 52 at 3).

We also observed that the Commissioner did not explain how on the record previously before us (prior to his filing the entire administrative record), the Court could reach the conclusions posited by the Commissioner that refuted Mr. Vallee's specific allegations. (Doc. 52 at 5). We attempted to resolve the parties' dispute concerning the sufficiency of the administrative record by ordering the Commissioner to file the administrative record with the Court, which he did on September 4, 2018 (Doc. 55).

The administrative record

Subsequent to our order of July 31, 2018, the Commissioner filed what he asserts to be the entire administrative record at issue in this case (Doc. 55). That filing includes, *inter alia*, an email sent on December 18, 2014, from Ms. Teresa Homola to Ms. Denise Nash. That email lists, as attachments, files that appear to be Mr. Vallee's Form 211 (in the form of three PDF files), a Microsoft Excel spreadsheet titled "ERCS Research Attachment", and a Microsoft Word document titled "Transmission of Claim memo".

In addition to sending the email to Ms. Nash, other IRS employees were "copied", as indicated by the persons included in the "Cc" line. The individuals copied on that email are: "Tarin Robert; Rubel Ivan A; Shuman Lisa J; Conroy William F; Blum Steven H; Homola Teresa; Gillin Kevin G; Idleman Susan M; Moore Stephen A; Fisher Jeannie B". (Doc. 52, R-000046).

Commissioner's response

In the Commissioner's response to our Order dated July 31, 2018, he persists in criticizing Mr. Vallee's arguments, referring to them as "nothing more than a conspiracy theory", and "speculative at best". (Doc. 53 at 13-14). He argues that "[t]he administrative record, as produced to petitioner on January 24, 2017, and filed with the Court concurrently with [his] response fully supports the Whistleblower Office's determination to deny petitioner's claim for a whistleblower award." (Doc. 53 at 16). The Commissioner contends that Mr. Vallee's Form 211 was almost 700 pages long; the exhibits to his Form 211 listed "thousands of taxpayer names"; Corporation D is listed in the group of 19 taxpayers who committed the alleged violation; and Related A and Related B were not identified by Mr. Vallee "on this lengthy list". (Doc. 53 at 8, n.2).

In his response, the Commissioner also discusses the issue of who received and who had access to Mr. Vallee's information. The Commissioner noted this Court's reasoning for denying the Commissioner's motion for summary judgment - the lack of "information to account for each individual who may have had access to [Mr. Vallee's] information." (Doc. 53 at 5, ¶8). The Commissioner responds that "the record indicates that only four individuals in LB&I received petitioner's information - David Horton, Denise Nash, Tammy Oswald (to whom it was assigned by her manager, Denise Nash), and Susan Idleman." (Doc. 53 at 11, ¶19). The Commissioner then discusses Ms. Oswald's sending Mr. Vallee's information to Ms. Carolyn Sullivan, with the IRS's SBSE Division, Estate & Gift (E&G) unit. Other than the aforementioned persons, the Commissioner's response makes no

reference to any other IRS employees who purportedly received Mr. Vallee's Form 211 information.

Mr. Vallee's response

In Mr. Vallee's response to our Order dated July 31, 2018, he argues that he included information concerning Corporation D, Related A, and Related B in his Form 211 (Doc. 58 at 19 (citing R-000229, R-000243, R-000284, and R-000311 through R-000446). While Mr. Vallee's Form 211 is voluminous, and is difficult to understand, the names of those entities do appear throughout the attachment to his Form 211. (Doc. 55, R-000243, ¶44).

Mr. Vallee asserts that "Corporate D and Related A had consolidated prior to [his] final determination letter (See R000031)." (Doc. 58 at 20). Mr. Vallee then goes on to argue "that this consolidation allowed Corporate D to use Related A's accumulated tax credits in order to satisfy its tax liability" and goes on to explain that "[t]his method is known as refund netting." (Doc. 58 at 20, citing 26 C.F.R. 301.7623-1 through 26 C.F.R. 301.7623-4, Proced. & Admin. Regs.). He concludes that "[t]he information concerning this consolidation is absent from the record and should be explained because both entities were clearly identified in petitioner's information (See Kasper 150 T.C. No. 2, p.20)[.]" (Doc. 58 at 21).

With respect to the Commissioner's response (Doc. 53) and the Commissioner's filing of the administrative record (Doc. 55), Mr. Vallee contends, *inter alia*, that the following individuals had access to the information he provided to the IRS on his Form 211: "T. Homola (Coordinator 1), R. Turchi (Coordinator 2), Ms. Denise D Nash, Mr. David Horton, Lisa J Shuman, William F Conroy, Steven H Blum, Kevin G Gillin, Susan M Id[le]man, Stephen A Moore, Jeannie B Fisher, R. Pruitt, C. Sullivan, T. Oswald, R. Tarin, I. Rubel and an individual named Josephine." (Doc. 57 at p.3).

Discussion

I. Scope and standard of review

The question before us in a whistleblower case brought under section 7623(b) is "whether the IRS collected proceeds as the result of an administrative or judicial action using the whistleblower's information * * *." Kasper v. Commissioner, 150 T.C. ___ slip op. at 20 (Jan. 9, 2018) (emphasis added). As for

the appropriate scope and standard of review in such a case, we review the administrative record, and we review it for an abuse of discretion. Id., slip op. at 20, 23-24.

We observe that the Commissioner's criticisms concerning Mr. Vallee's lack of specificity on his Form 211 appear to have merit. The term "refund netting" appears nowhere in Mr. Vallee's Form 211 or its attachments, or anywhere else in the administrative record. Therefore, some of the arguments advanced by Mr. Vallee in his response to our previous order (and in some of his other filings) appear to further develop or advance new claims, not originally found in his Form 211 or its attachments. Therefore, we remind Mr. Vallee that we review only whether the IRS abused its discretion in denying his award, and emphasize that this is not a forum in which to cure deficiencies with his previous claims, to further develop his previous claims, or to advance new claims. See Kasper v. Commissioner, 150 T.C. ___ slip op. at 20 (Jan. 9, 2018).

II. The completeness of the administrative record

A. Not an opportunity to cure defects

It is true that an agency may not unilaterally determine the contents of the administrative record that a court may review. Whistleblower One 10683-13W v. Commissioner, 145 T.C. 204, 206 (2015). 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.

However, it is also true that "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).

Thus, to the extent that Mr. Vallee contends that the administrative record is incomplete because he believes that "[t]he information concerning this

consolidation [of Corporation D and Related A] is absent from the record and should be explained because both entities were clearly identified in petitioner's information * * *", he evidently misunderstands what constitutes a complete administrative record. See Whistleblower One 10683-13W v. Commissioner, 145 T.C. 204, 206-208 (2015). If Mr. Vallee did not allege the issue of the consolidation or the subsequent "refund netting" as part of his initial Form 211 information, and the IRS decision-makers did not "directly or indirectly" consider any material that would explain the consolidation of Corporation D and Related A, in the process of making their final determination, then the administrative record would not necessarily include an explanation of such an action by the taxpayer (consolidated or otherwise).

B. Whistleblower information used in the collection of proceeds

As we noted above, our previous order observed that Mr. Vallee advanced, with a level of specificity and citation to supporting documents not employed in some of his other arguments, allegations that the IRS entered into a "concealed" examination of, and that the IRS entered into a settlement with, taxpayers identified in his Form 211. ((Doc. 52 at 5 (citing Doc. 33 at 20-21, 32). Mr. Vallee provided documents that appeared to substantiate at least some of these claims. (See Doc. 34 at Exs. I, J, and R). The Commissioner contested these assertions, stating that "[Corporate D's] return had already been selected for examination at the time petitioner's information was forwarded to LB&I"). (Doc. 47 at 5, ¶15). For that proposition the Commissioner relied on:

The declarations of Teresa Homola and Tammy Oswald [to] demonstrate that petitioner's information was not referred to LB&I until after [Corporate D] was selected for examination and that, upon receipt of the information by Tammy Oswald, the information was returned to the Whistleblower Office without use by LB&I.

We already stated that those "declarations, as drafted, fail to show that * * * Mr. Vallee's information had not been further disseminated and used." (Doc. 52 at 11). In response to our Order the Commissioner did not provide amended declarations, nor did he provide new declarations for the additional IRS employees the Court identified in our previous Order, nor did he provide declarations for any of the other employees who were copied in the email that presumably contained Mr. Vallee's information.

Rather, in response to our Order, the Commissioner states (without any supporting affidavit or other documentary evidence) that the “the record indicates that only four individuals in LB&I received petitioner’s information - David Horton, Denise Nash, Tammy Oswald (to whom it was assigned by her manager, Denise Nash), and Susan Idleman.” (Doc. 53 at 11, ¶19). The Commissioner goes on to state each of the four LB&I employees’ respective titles, explain the actions undertaken by Ms. Oswald and the other three individuals who are apparently her supervisors, and asserts that:

These actions indicate the IRM provisions discussed above, were followed. Each of the individuals who received information prior to Ms. Oswald simply passed the assignment through the appropriate channels to ensure that Ms. Oswald could review the case file and determine the materiality of the information. In following the protocol of the IRM, the Whistleblower Office and Operating Divisions ensured the utmost confidentiality of petitioner’s information, keeping documents from being readily available to any others within the IRS without the need to access the information. Moreover, under IRS procedures, Ms. Oswald’s Form 11369 provides feedback on behalf of the LB&I operating division with respect to petitioner’s information. As such, there was no need to follow-up with the other three individuals in LB&I who were responsible for assigning the information to Ms. Oswald for review.

(Doc. 53 at 11-12).

While the actions discussed by the Commissioner may be indicative that the IRM provisions were followed, that assertion is not supported by any affidavits or declarations by affidavits David Horton, Denise Nash, and Susan Idleman--“the other three individuals in LB&I”. While a declaration from Ms. Oswald was entered into the record, she does not have the personal knowledge to testify about whether “the other three individuals in LB&I”, further disseminated Mr. Vallee’s information, or if they did, as the Commissioner now asserts, “simply passed the assignment through the appropriate channels”.

The Commissioner has again failed to provide the necessary factual foundation to support his conclusion or to cite the administrative record in a manner that would allow Court to reach the same conclusion. Such a conclusion requires evidence showing that: (1) the other three individuals were employed in

the manner alleged by the Commissioner; (2) these four individuals did not provide Mr. Vallee's information to any other persons in LB&I; (3) none of the other individuals who received Mr. Vallee's information worked for LB&I; and (4) none of the other persons who received Mr. Vallee's information provided his information to any other person who worked for LB&I.

Therefore, it appears that two (still) unanswered questions--most germane to whether Mr. Vallee is entitled to an award under section 7623(b)(1)--remain at issue: (1) who received Mr. Vallee's Form 211 information, and what those individuals did with it; and (2) whether that information was used in an examination that resulted in the collection of proceeds.

III. Remand when the administrative record is incomplete

In his August 30, 2018, response to our order the Commissioner suggested that "[t]o the extent the Court determines that the administrative record is not sufficient to evaluate the Whistleblower Office's determination, the proper remedy is to remand the case for additional factual development by the Whistleblower Office and not the Tax Court." (Doc 53 at 15, ¶23 (citing County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999); PPG Indus. Inc. v. U.S., 52 F.3d 363, 365 (D.C. Cir. 1995); SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943)).

After receiving the Commissioner's response, containing that suggestion, this Court issued its opinion in another case, Whistleblower 769-16W v. Commissioner, 152 T.C. __ (April 11, 2019), which held that in appropriate circumstances this Court may remand a whistleblower case to the Whistleblower Office. Whistleblower 769-16W v. Commissioner, slip op. at 17. This remedy is consistent with the Supreme Court's statement in Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) that:

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).

Mr. Vallee contends that a remand is not appropriate (see Doc. 57 at 9, Doc. 58 at 6), but his arguments are unsound.

To the extent that the administrative record does not resolve the questions of (1) who received Mr. Vallee's Form 211 information, and what those individuals did with it; and (2) whether that information was used in an examination that resulted in the collection of proceeds, a remand to the WBO is appropriate. Mr. Vallee's motion to compel (Doc. 14) remains pending, and we will address it, as needed, after the proceedings on remand.

To give effect to the foregoing, it is

ORDERED: That on the Court's own motion this case is remanded to respondent's WBO for further consideration consistent with this order and specifically addressing: (1) who received Mr. Vallee's Form 211 information, and what those individuals did with it; and (2) whether that information was used in an examination that resulted in the collection of proceeds. It is further

ORDERED: That upon conclusion of the WBO's further consideration of petitioner's whistleblower award claim, the WBO shall issue a supplemental determination, which shall provide an explanation of its determination including the answers to the two questions stated above. It is further

ORDERED: That the supplemental determination shall be filed with the Court along with a certification from respondent's WBO that (1) presents any additions to the administrative record that result from the proceedings on remand and (2) certifies that those additions, along with the administrative record previously filed in this case, constitute the whole administrative record consistent with In re U.S., 138 S.Ct. 371, 372 (2017). It is further

ORDERED: That, on or before, July 10, 2019, the parties shall file a joint status report giving their joint recommendation of a timetable for further

administrative proceedings, if that is possible; or, if a joint recommendation is not possible, then the parties shall file separate status reports giving their separate recommendations.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 10, 2019