

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ARTHUR M. BIALER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 6983-19W.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This is a “whistleblower” case brought pursuant to I.R.C. section 7623(b). The Commissioner has filed a motion for a continuance (Doc. 22) that asks us to restore the case to the general docket. Petitioner Arthur M. Bialer filed an opposition (Doc. 23), urging a prompt trial in this case. It seems that both the motion and the opposition may reflect fallacies about the likely further proceedings in this case. We will deny the motion without prejudice.

Background

The petition (Doc. 1) was filed May 1, 2019. By notice dated August 28, 2019 (Doc. 15), we set this case for trial at the Court’s session in Washington, D.C., beginning January 13, 2020. The Commissioner filed his motion for a continuance (Doc. 22), which states in part:

5. Respondent will likely file a motion for summary judgment in this case.

6. This case was set for trial less than nine months after the petition was filed, and the notice setting the case for trial was issued 28 days from when the case was first deemed at issue under Tax Court Rule 38. Given the posture of the case, a trial on January 13, 2020 would be premature.

Mr. Bialer's opposition complains about "respondent's twelve-year campaign of delay, obfuscation, and destruction and/or suppression of evidence", a complaint that we cannot now evaluate. He also opposes any continuance and explains how immediate action by the parties could enable them to be ready for trial by January 13, 2020.

Discussion

In a whistleblower case, we review for abuse of discretion the determination of the IRS's Whistleblower Office ("WBO"); and the scope of our review is the administrative record. Kasper v. Commissioner, 150 T.C. ___ (Jan. 9, 2018). While it is possible that in such a case the Court would need to conduct an evidentiary hearing in order to resolve disputes about the contents of the administrative record, there would be no trial about the facts of the case per se.

In this case neither party has filed a proposed administrative record; and it is evident that the parties have neither agreed on the contents of that record nor yet identified any particular disputes. We therefore cannot tell when this case will be ready for decision on the merits nor even when it might be ripe for an evidentiary hearing on the contents of the administrative record, if needed. The parties' disagreement about a protective order was addressed in our order of November 18, 2019 (Doc. 21), and a protective order has not yet been issued. It therefore seems highly unlikely that this case can be submitted for decision by January 13, 2020.

However, having this case on the calendar for the January 2020 session may nonetheless prove useful if there are any motions pending at that time or if (though it seems unlikely) the parties are ready at that time for any necessary evidentiary hearing. We will therefore leave the case on the calendar for that session. One reason for doing so is to encourage the Commissioner to cooperate with petitioner in making progress in this case, as petitioner is evidently eager to do.

The Commissioner anticipates that, once the contents of the administrative record have been identified, he will be in a position to request a merits decision without trial on the basis of a motion, which he characterizes as a "motion for summary judgment" (i.e., under Rule 121). When addressing a motion for "summary judgment", however, we look for a dispute of material fact and then we deny the motion in the presence of such a dispute. It would seem that, if we followed the procedures of Rule 121 in this whistleblower case, then if there were a dispute of fact as to whether the WBO had abused its discretion, we would not

resolve that dispute but instead would deny the motion. Such a denial would then be followed by a trial at which the dispute would be tried and decided--but, as we have observed, whistleblower cases are decided not after trial but on the basis of the administrative record. Under the principles set out in Kasper, it would seem that, once we have the administrative record before us, we decide “genuine disputes of material fact” (contrary to the procedures of Rule 121) about whether or not the WBO abused its discretion. If this reasoning is correct, then a party seeking a decision in his favor in a whistleblower case should move not for “summary judgment” but perhaps for entry of decision, more resembling a motion under Rule 122. It is

ORDERED that the Commissioner’s motion for a continuance is denied without prejudice. For the present the case will remain on the calendar of the Court’s trial session beginning January 13, 2020. However, the parties need not file pretrial memoranda as directed in our standing pretrial order of August 28, 2019 (Doc. 16); and the Court does not wish to cause the parties to incur expense or trouble to have counsel appear unnecessarily at that session of the Court. It is therefore further

ORDERED that, if there is any matter as to which a party believes that it would be useful to appear before the Court on January 13, 2020, that party shall initiate a telephone conference with the Court and the other party by calling the Chambers Administrator of the undersigned judge no later than December 30, 2019. If neither party thus initiates a telephone conference by that date, then the Court would entertain (and would expect to grant) a motion to continue the case, with the undersigned judge retaining jurisdiction. It is further

ORDERED that, no later than January 31, 2020, the parties shall file a joint status report (or, if that is not expedient, then separate reports) that shall include the parties’ recommendations for a schedule of further proceedings in this case. That report shall include the parties’ understanding of the nature of any dispositive motions that the parties expect to file.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
December 2, 2019