

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

WADE H. HORSEY,)	
)	
Petitioner,)	
)	
v.)	Docket No. 10662-19W.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND DECISION

This whistleblower action was commenced pursuant to section 7623(b)(4).¹ Pending before the Court are (1) Respondent’s Motion for Summary Judgment, filed January 16, 2020; (2) Respondent’s Declaration and Certificate of Authenticity of Domestic Business Records Pursuant to Federal Rules of Evidence 902(11), also filed January 16, 2020 in support of the motion; and (3) Petitioner’s Notice of Objection to Motion for Summary Judgment, filed on February 11, 2020.

The issue before the Court is whether the Internal Revenue Service’s (IRS) Whistleblower Office (WBO) abused its discretion in rejecting Mr. Horsey’s claim. Respondent has moved for summary judgment under Rule 121, contending that there are no disputed issues of material fact and that the WBO did not abuse its discretion by rejecting Mr. Horsey’s claim for an award under section 7623.

We will describe the factual background more fully, but this case can be summarized as follows:

1. Respondent’s WBO received petitioner’s claim for award and directed the claim to respondent’s Large Business and International (LB&I) Operating Division for evaluation.

¹ Section references are to the Internal Revenue Code of 1986, as amended. Rule references are to the Tax Court Rules of Practice and Procedure, available on the Internet at www.ustaxcourt.gov.

2. A Classifier in respondent's LB&I Operating Division reviewed the information submitted by petitioner and determined that it should be rejected.
3. Respondent did not initiate administrative or judicial action against any target taxpayers as a result of the information provided by petitioner.
4. Respondent did not collect any Federal tax, penalties, interest, additions to tax, or additional amounts as a result of the information provided by petitioner.

Background

Petitioner's claim for award was made known to respondent by the submission of a Form 211, Application for Award for Original Information, with respondent's WBO. The WBO received the Form 211 on November 19, 2018. Petitioner's Form 211 asserted that the target taxpayers, several financial institutions, violated standards set forth for Real Estate Mortgages Investment Conduits (REMICs) by contributing mortgage notes to a REMIC that had closed in an earlier year. According to petitioner, such contribution created a tax liability to the target taxpayers equal to 100% of the value of the notes contributed. Although not clarified in the administrative file, petitioner made clear to this Court that the 100% tax that he was referring to was governed by section 860G(d)(1), which section imposes a 100% tax on any contributions to a REMIC after its startup date, with limited exceptions.

According to petitioner, the target taxpayers contributed, in 2008, mortgage loans, including petitioner's mortgage loan, to a REMIC whose startup date was in 2005, which actions should have resulted in a 100% Federal tax assessment. If such a deficiency were pursued and successful, the amount collected would total \$1.791 billion.

On November 30, 2018, the WBO assigned petitioner's claim for award an identifying number (2019-003050) and notified petitioner of the same. On January 29, 2019, petitioner's claim for award was referred to respondent's LB&I Operating Division, then assigned to Ms. Tse, an LB&I Classifier, to determine if administrative or judicial actions against the target taxpayers were warranted based on the information in petitioner's claim for award.

Ms. Tse reviewed the file and determined that petitioner failed to provide any detailed substantiation for his claim for award and that it should be rejected without initiating an administrative or judicial action against the target taxpayer[s]. Specifically, she determined: “Reject the Claim: Allegations are not specific, credible, or are speculative - Allegations are purely speculative in nature.” Ms. Tse memorialized her findings by filling out the Classification Section of respondent’s Award Recommendation Memorandum (ARM) on May 17, 2019, and sent that document to WBO Examining Technician Angela Norton. Ms. Norton received the ARM on May 20, 2019 and, in turn, filled out the remaining portions of the ARM and sent it to her manager recommending a rejection of the claim for award. Ms. Norton then prepared a letter titled Final Decision under Section 7623(a) (final decision letter). That final decision letter was dated May 24, 2019 and was signed by another individual on behalf of the WBO Program Manager.

The final decision letter stated “[t]he claim has been rejected because the IRS decided not to pursue the information you provided.” In other words, the IRS declined to open any administrative or judicial actions against the target taxpayers identified by petitioner. Therefore, respondent did not collect any proceeds from which to pay an award. It is that determination which petitioner appealed in his timely petition, filed June 21, 2019.

Discussion

I. Summary Judgment

Summary judgment serves to “expedite litigation and avoid unnecessary and expensive trials.” Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy, but we may grant summary judgment only if there is no genuine dispute as to any material fact. Rule 121(a); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). Petitioner’s objection filed on February 11, 2020 did not allege any dispute as to the facts set forth in respondent’s summary judgment motion or the declaration relied upon by respondent in support of the motion. Instead, petitioner argues that:

The fact that the Internal Revenue Service does not FEEL like investigating significant potential liability is normally not a justification for circumventing a day in tax court. [sic] With the change in Administration and the guidance

of the Tax Court perhaps the Internal Revenue Service can be persuaded to pursue large organizations that violate the tax law.

We conclude that this case is ripe for summary adjudication because there is no dispute as to a material fact.

II. Standard of Review

We held in Kasper v. Commissioner, 150 T.C. 8 (2018), that we review the WBO's decisions not de novo but rather for abuse of discretion. Consequently, in reviewing for abuse of discretion a claim for award determination, we do not substitute our judgment for the WBO's but rather decide "whether the agency's decision was 'based on an erroneous view of the law or a clearly erroneous assessment of the facts.'" Kasper v. Commissioner, 150 T.C. at 23 (quoting Fargo v. Commissioner, 447 F.3d 706, 709 (9th Cir. 2006), aff'g T.C. Memo. 2004-13). "[T]he 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). For the reasons explained below, the WBO did not abuse its discretion here.

III. Analysis

Section 7623 provides for monetary awards to those individuals (i.e., whistleblowers) who provide information to the Government about target taxpayers who are underpaying their taxes. Section 7623(a) gives the WBO authority to make payments to whistleblowers for the detection of those who are violating the Internal Revenue laws. As amended in 2018,² section 7623(b)(1) 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

² The Bipartisan Budget Act of 2018, Pub. L. No. 115-123, sec. 41108, 132 Stat. at 158-159, amended some of the terminology in section 7623, effective date of the amendments is uncertain. See Whistleblower 23711-15W v. Commissioner, T.C. Memo 2018-34 at *15 n.6. None of the amendments has any effect on the issues we decide here, and in this Order, we quote the statute as amended.

(including any related actions) or from any settlement in response to such action * * *.

Section 7623(b)(5) defines the scope of claims that are subject to the nondiscretionary award program established in subsection (b). The IRS must pay claims on a nondiscretionary basis only with respect to actions against a taxpayer whose “gross income exceeds \$200,000 for any taxable year subject to such action” and only “if the proceeds in dispute exceed \$2,000,000.” Sec. 7623(b)(5)(A) and (B). The IRS must raise a failure to satisfy these monetary thresholds as an affirmative defense. See Lippolis v. Commissioner, 143 T.C. 393, 400 (2014).

As we set forth in our recent whistleblower opinion, Lacey v. Commissioner, 153 T.C. ___, (Nov. 25, 2019), the process for the WBO’s evaluation of a claim for award is as follows. When the WBO receives a claim for award, it makes an initial determination to accept or reject the claim at its threshold. Lacey v. Commissioner, 153 T.C. at ___ (slip op. at 23).³ This determination is made solely on the basis of the face of the whistleblower’s submission itself. Id. If the WBO accepts the claim for award, then it refers the claim to an operating division of the IRS for further consideration. Lacey v. Commissioner 153 T.C. at ___ (slip op. at 26).

The operating division then decides whether or not to take administrative or judicial action against the target taxpayer[s]. Sec. 7623(b)(1). If the operating division declines to take administrative or judicial action against the target taxpayer[s], as is the case here, then the claim for award is returned to the WBO for disposition. 26 C.F.R. sec. 301.7623-3(c)(8), Proced. & Admin. Regs.

Here, two points are crucial. First, under the plain language of section 7623(b)(1), an award is dependent upon “both the initiation of an administrative or judicial action and collection of tax proceeds.” Cooper v. Commissioner, 136 T.C. 597, 600 (2011); see also Cohen v. Commissioner, 139 T.C. 299, 302 (2012), aff’d, 550 Fed. Appx. 10 (D.C. Cir. 2014).

³ Threshold factors include whether there is specific, credible information which is believed will lead to collected proceeds, and whether the information is related to an identified target taxpayer believed to have failed to comply with the Internal Revenue laws. Lacey v. Commissioner, 153 T.C. at ___ (slip op. at 23-24). The whistleblower must also provide substantive information, including all available documentation; and the information cannot be speculative. Id.

Second, we do not review an operating division’s decision whether to administratively review a target taxpayer in response to a whistleblower’s claim, and we have no authority to require the operating division to explain a decision not to pursue any action against the target. Lacey v. Commissioner, 153 T.C. at ___ (slip op. at 30). Very importantly, “Congress has not conferred on the Tax Court authority to direct the IRS to commence or continue an audit, * * * [c]onsequently, a case in which the whistleblower asks us to order an audit or order collection will fail.” Lacey v. Commissioner, 153 T.C. at ___ (slip op. at 33). As we stated in Lacey:

[S]ection 7623(b) does not convert the Tax Court into an overseer of the IRS’s audit and collection activity. Rather, the statute confers upon the Tax Court jurisdiction with respect to “[a]ny determination regarding an award under paragraph (1), (2) or (3). Sec. 7623(b)(4) (emphasis added) * * * but the statute’s description of our jurisdiction refers to paragraphs (1), (2) and (3) of section 7623(b), and in those paragraphs the only “determination[s]” referred to are those by “the Whistleblower Office”, i.e., not acts by the Secretary’s delegates within the IRS who conduct examination and collection activity.

* * * * *

The IRS and not the Tax Court decides whether and how to audit a taxpayer’s return, and section 7623(b)(4) confers on the Tax Court jurisdiction not to supervise audits but to review the acts of the WBO. Clearly it is not the WBO but rather the IRS “Operating Division” that makes “determinations not to proceed with an action”. The Tax Court does not review such audit decisions.

Lacey v. Commissioner, 153 T.C. at ___ (slip op. at 28-29 & 35) (internal citations omitted); 26 C.F.R. sec. 301.7623-4(d)(2)(ii), Proced. & Admin. Regs.

Thus, we are constrained in the present case to our authority under section 7623(b) to respect the decision of the IRS LB&I Operating Division not to initiate administrative or judicial action against the target taxpayer[s] and we can only review the WBO’s determination to reject the claim. While we understand petitioner’s desire that this Court persuade the IRS to pursue the large target organizations identified in his whistleblower claim for violating the tax law, we simply do not have Congressional authority to do so. Cooper v. Commissioner,

136 T.C. at 600; Cohen v. Commissioner, 139 T.C. at 302. Congress authorized this Court to review an award determination, but “Congress did not authorize the Court to direct the [IRS] to proceed with an administrative or judicial action.” Cooper v. Commissioner, 136 T.C. at 600.

Here, as in Cooper and Cohen, petitioner acknowledges that his claim did not lead to the IRS LB&I Operating Division commencing administrative or judicial action against any target taxpayers nor collecting any proceeds from any target taxpayers. While we are sympathetic to petitioner’s desire that we compel the IRS to investigate the target taxpayers for potential tax violations, we have no authority to take such action. Without the authority, there is no light favorable enough for us to find that the WBO abused its discretion in rejecting petitioner’s claim for award. It follows that respondent is entitled to a decision as a matter of law. See Rule 121(a).

To reflect the foregoing,

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED and DECIDED that the determination made by respondent in the final decision is sustained.

**(Signed) Elizabeth A. Copeland
Judge**

ENTERED: **MAR 05 2020**