UNITED STATES TAX COURT
WASHINGTON, DC 20217

MONIQUE EPPERSON,	)	
	)	
Petitioner,	)	
	)	**CT**
v.	)	Docket No. 20287-18W.
	)	
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 on September 5, 2019; 2) Respondent's Unsworn Declaration of Jennifer Graf under Penalty of Perjury in Support of Motion for Summary Judgment, also filed on September 5, 2019; 3) Petitioner's Opposition to Motion for Summary Judgment, filed on September 17, 2019; and 4) Petitioner's Unsworn Declaration of Monique Epperson under Penalty of Perjury in Support of Opposition to Motion for Summary Judgment, also filed on September 17, 2019.

The issue before the Court is whether the Internal Revenue Service's (IRS) Whistleblower Office (WBO) abused its discretion in rejecting petitioner Monique Epperson's claims for whistleblower awards (to be discussed in further detail infra). Respondent has moved for summary judgment under Rule 121, contending that there is no genuine issue as to any material fact, the WBO did not abuse its discretion in rejecting Ms. Epperson's claims, and respondent is entitled to summary adjudication.

Background

The following background is derived from the pleadings, the parties' motion papers, and the supporting exhibits attached thereto. We note that the background

[1] All section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

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is stated solely for purposes of ruling on the pending motion for summary judgment and is not a finding of facts.

Monique Epperson was a resident of Nevada at the time her petition was filed. The uncontested facts are as follows: During 2016 and 2017, Ms. Epperson was involved in a child custody dispute in her local family court system. In connection with that litigation, she and her ex-husband were ordered to retain the services of several attorney, physician, and psychology service providers based on a court approved list of outsource service providers. She independently contracted with those providers and paid them with either cash, check, or credit card during the 2016 and 2017 tax years.

In December 2017, the WBO received five Forms 211, Application for Award for Original Information, from Ms. Epperson, all dated November 28, 2017. The primary target taxpayer from those Forms 211, was the government entity identified above (the Family Court). The remaining Forms 211 identified four outsource service providers that had been paid by Ms. Epperson or her ex-husband in connection with her Family Court proceeding (collectively, the Contractors).[2]

Ms. Epperson's primary whistleblower claim is that the Family Court did not issue Forms 1099-MISC to its outsource service providers. Ms. Epperson contended that the Family Court, which required persons appearing before it to use court-approved third-party independent contractors for various professional evaluations and services, was required to issue Forms 1099-MISC for the payments received by those independent contractors from Family Court litigants. Ms. Epperson's secondary whistleblower claims were that the four identified Contractors underreported income from fees received from Family Court litigants. In her initial whistleblower submissions, as to three of the four Contractors identified, Ms. Epperson provided proof of the payments she made to them. As to the remaining contractor, she submitted a page from her service contract that detailed the required fee for services. Although the payments she and her ex-husband made to the Contractors were relatively small (in total, $13,055), the claim against the Family Court was "unknown as to [the] amounts litigants have paid to each provider."

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[2] We refer to target taxpayers in generic terms to protect the identities of non-party taxpayers. See Rule 345(b).

Also, in connection with her claim for an award, on November 27, 2017, Ms. Epperson sent a letter to the Family Court. In that letter, Ms. Epperson asserts that:

> According to the IRS, when a business pays an independent contractor $600.00 or more over the course of a tax year, it is required to report these payments to the IRS on an information 1099-MISC form.

Less than two weeks later, on December 8, 2017, the Family Court sent a response stating that:

> The Court does not generate IRS Form-1099 tax records for individuals who were paid from non-Court funds. Since the payments to which you referred in your letter were issued by you and not the Court, the Court did not generate Form-1099 tax forms in those circumstances.

Ms. Epperson attached her initial November 27, 2017 letter and the Family Court's response to a supplemental submission she made to the WBO dated December 21, 2017, which was received by the WBO on January 5, 2018.

As child custody matters are usually sealed (i.e., they are not available for public viewing), Ms. Epperson asserted that the Contractors were using that attribute to conceal unreported income received from litigants appearing before the Family Court.

Upon receiving the initial Forms 211, the WBO assigned master claim number 2018-003598 to the Family Court (identified in the administrative file as Taxpayer A), and related claim numbers to the Contractors: 2018-003599 (Contractor B), 2018-003600 (Contractor C), 2018-003601 (Contractor D), and 2018-003602 (Contractor E).[3] First, in the WBO's electronic tracking system (e-trak), the WBO classifier coded the claims as falling within the purview of the Small Business and Self-Employed division (SB/SE) of the IRS. Then, on January 10, 2018, the classifier re-coded the Family Court claim as belonging to the Tax Exempt and Government Entities division, particularly the sub-division responsible for Federal, State, and Local Governments (TEGE). Additionally, the classifier

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[3] The administrative file identifies the Contractors as "Taxpayers" with the letters noted here. For consistency, we have adopted the lettering used by the WBO, but substituted the word "Contractor" for "Taxpayer."

placed the Contractors' claims in suspense based on the related master claim, with instruction to "follow any action taken on the related claim."

On April 16, 2018, Ms. Epperson supplemented her claim by submitting fee agreements signed by two other, unrelated litigants before the Family Court (Case 1 and Case 2). Similar to Ms. Epperson, these litigants were ordered by the Family Court to retain the services of outsource service providers approved by the Family Court. With respect to Case 1, Ms. Epperson submitted fee agreements for attorney and psychological services. The total amount paid by the litigants in Case 1 is unknown, but the agreements provide that: 1) a $1,500 retainer was to be paid to an attorney for her services, valued at $300 per hour; and 2) a $3,500 retainer was to be paid to a psychologist for his services, valued at $280 per hour. With respect to Case 2, Ms. Epperson submitted a fee agreement for psychological services. Similar to Case 1, the total amount paid by the Case 2 litigants is unknown, but the agreement provides that the psychologist was to be paid a $1,500 retainer, and the estimated total fee for the psychologist's work was $2,500.

On June 19, 2018, within TEGE, the master claim was assigned to Jan Germany, a subject matter expert within the Classifications Function of TEGE. Ms. Germany reviewed Ms. Epperson's claims and researched the law behind the claims. She determined as follows:

> Individuals do not issue Form 1099-MISC to payees for services provided. Since the courts did not make payments to the payees for these services, the courts do not have an information report filing requirement. * * * The non-filing of information returns alleged by the claimant cannot be addressed by the IRS. * * * This claim is being denied due to the lack of a credible tax issue – Treas. Reg. 301.7623-1(c)(1), IRM 25.2.1.4(2)(a), IRM 25.2.1.1.3(3), and IRM 25.2.1.3.2(5).

On August 31, 2018, Ms. Germany signed a Form 11369, Confidential Evaluation Report on Claim for Award, which rejected the Family Court claim for the reason stated above. The Form 11369 was approved by a Whistleblower Official within TEGE on September 5, 2018 and was received by the WBO the next day.

Based on the Form 11369, WBO Analyst Jennifer Graf recommended to her manager that the Family Court and Contractors' claims be rejected as the "Allegations are Not Specific, Credible, or are Speculative." On September 18, 2018, the WBO mailed a section 7623(a) final decision letter to Ms. Epperson

rejecting her claim for an award on all five claim numbers. On October 15, 2018, Ms. Epperson timely filed a petition with this Court seeking review of respondent's decision.

Discussion

I. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. FPL Group, Inc. & Subs. v. Commissioner, 116 T.C. 73, 74 (2001). We may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); see also Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we view the factual materials and inferences drawn from them in the light most favorable to the nonmoving party, Ms. Epperson in this case. Sundstrand Corp. v. Commissioner, 98 T.C. at 520 (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986)).

II. Scope and Standard of Review

In whistleblower cases, our scope of review is limited to the administrative record at hand, with limited exceptions. Kasper v. Commissioner, 150 T.C. 8, 20-22 (2018). These exceptions apply: 1) when agency action is not adequately explained in the record; 2) when the agency failed to consider relevant factors; 3) when the agency considered evidence which it failed to include in the record; 4) when a case is so complex that a court needs more evidence to understand the issues clearly; 5) where there is evidence that arose after the agency action showing whether the decision was correct or not; and 6) where the agency's failure to take action is under review. Id. (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)).[4] Here, the administrative record was provided as an exhibit to the

[4] Since Esch v. Yeutter was decided, the D.C. Circuit has reduced the list of applicable exceptions from six to three. A reviewing court can look beyond the administrative record if: 1) "the agency deliberately or negligently excluded documents that may have been adverse to its decision"; 2) "background information was needed to determine whether the agency considered all the relevant factors"; or 3) "the agency failed to explain administrative action so as to frustrate judicial review." City of Dania Beach v. FAA, 628 F.3d 581, 590 (D.C. Cir. 2010) (citing American Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008)) (internal quotation marks omitted). Because the exception that applies here

Unsworn Declaration Under Penalty of Perjury by Jennifer Graf. Because the exhibit contains identifying information related to the Family Court and the Contractors, that exhibit was ordered sealed by the Court. See Rules 27(a), 27(c), and 345(b).

Our standard of review in whistleblower cases is abuse of discretion. This means that we will not substitute our judgment for the WBO's, but will 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 22-24 (quoting Fargo v. Commissioner, 447 F.3d 706, 709 (9th Cir. 2006)). For the reasons explained below, we conclude that the WBO did not abuse its discretion with respect to the Family Court claim and that we do not have sufficient information to properly review the agency's action with respect to the Contractors' claims. That is, the WBO's actions are not adequately explained by the administrative record put forth by the Commissioner. Accordingly, we will partially grant summary judgment with respect to the Family Court claim; and partially deny summary judgment, without prejudice, with respect to the Contractors' claims.

III. Analysis

A. Section 7623

Section 7623 allows the IRS to give an award for information that the IRS uses to collect tax or bring to trial persons guilty of violating internal revenue laws. The section provides for both discretionary and mandatory awards. Discretionary awards are paid under section 7623(a); whether an award is paid and the amount of such award is entirely within the WBO's discretion. See 26 C.F.R. sec. 301.7623-1(a), Proced. & Admin. Regs. However, if the whistleblower identifies a taxpayer whose proceeds[5] in dispute exceeds $2,000,000; and in the case of an individual

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is listed in both Esch and City of Dania Beach, we do not need to decide which list is the definitive one for our purposes.

[5] 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, including adding a definition of "proceeds" in subsection (c). We recently held that these amendments apply to any whistleblower claim until such claim can no longer be further challenged in this Court or elsewhere, so the amendments would apply

taxpayer, whose gross income exceeds $200,000 in any taxable year, then an award equal to between 15 percent to 30 percent of collected proceeds must be paid. See secs. 7623(b)(1), 7623(b)(5).[6] Additionally, to be eligible to receive an award under section 7623(b), two basic requirements must be met: 1) the IRS, based on the information the whistleblower provided, must bring an "administrative or judicial action"; and 2) the IRS must collect proceeds from such action. Cooper v. Commissioner, 136 T.C. 597, 600 (2011).

In the event the whistleblower is not satisfied with the IRS's determination as to eligibility for an award under section 7623, Congress has given whistleblowers the ability to seek judicial review of their award determination. Sec. 7623(b)(4). This right does not apply to all award determinations – whistleblowers may only seek judicial review of award determinations made under section 7623(b), and not 7623(a). See id. In other words, judicial review is available only to claims where the proceeds in dispute exceed $2,000,000; and an individual target taxpayer has a gross income of at least $200,000 for the tax year(s) at issue. Here, Ms. Epperson's claim against the Family Court was "unknown as to [the] amounts paid by each litigant" and thus, taken in the light most favorable to Ms. Epperson, could have led to collected proceeds in excess of $2,000,000.

Ms. Epperson's claim against the Contractors was fairly small (in total, $13,055). Three of the four contractors (Contractors C, D, and E) were individuals and the remaining contractor (Contractor B) was a corporation. Nothing in the parties' pleadings, motion papers, or exhibits attached thereto provide the gross

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here. See Lewis v. Commissioner, 154 T.C. ___, ___ (slip op. at 16) (Apr. 8, 2020).

[6] These percentages are subject to limitations. Section 7623(b)(2) addresses circumstances where there is a less substantial contribution on the part of a whistleblower and provides the WBO, in such circumstances, with discretion to award an amount that does not exceed 10%. Section 7623(b)(3) provides circumstances where the WBO has discretion to reduce or deny an award, with no limits. The regulations provide guidance as to how an award should be calculated under sections 7623(b)(1), (b)(2), and (b)(3), including a list of positive and negative factors meriting an increase or decrease of the award percentage, and when an award should be reduced or denied under section 7623(b)(3). See 26 C.F.R. secs. 301.7623-4(b), 301.7623-4(c), Proced. & Admin. Regs.

income of the individual contractors. Thus, taken in the light most favorable to Ms. Epperson, the gross income of the individual contractors could have exceeded $200,000. As to all contractors, the proceeds in dispute fall below the $2,000,000 threshold in section 7623(b)(5)(B). However, we have previously held that the threshold limitation in section 7623(b)(5)(B) is not jurisdictional, but is instead an affirmative defense that must be raised and proven by the Commissioner. Lippolis v. Commissioner, 143 T.C. 393, 400 (2014). Nowhere in his answer does the Commissioner raise this affirmative defense. At best, in his motion for summary judgment, the Commissioner argues: "Petitioner has not met the threshold prerequisites for an award under I.R.C. sec. 7623(b), and is thus not entitled to any award." An affirmative defense cannot be raised, for the first time, in a motion for summary judgment. Our rules require that an answer "be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. * * * [T]he answer shall contain a clear and concise statement of every ground, together with the facts in support thereof on which the Commissioner relies and has the burden of proof." Rule 36(b); see also Whistleblower 14376-16W v. Commissioner, T.C. Memo. 2017-181 at *14. Because the Commissioner has not raised this affirmative defense in his answer, we cannot and will not consider it here. Thus, the fact that the Contractors' claims fall below the $2 million threshold is not fatal to Ms. Epperson's petition for judicial review.

B. The Family Court Claim

When the WBO receives a claim for award (i.e., Form 211), it makes an initial determination to accept or reject the claim at its threshold. See 26 C.F.R. sec. 301.7623-1(c)(1), Proced. & Admin. Regs.; see also Internal Revenue Manual (IRM) pt. 25.2.2.4 (Aug. 7, 2015).[7] This determination is made solely on the basis of the face of the whistleblower's submission itself. Id. If the claim for award passes the threshold review, the WBO then refers the claim to an operating division of the IRS for further consideration. IRM pt. 25.2.2.4(3) (Aug. 7, 2015); see also 26 C.F.R. sec. 301.7623-4(d) Ex.1, Proced. & Admin. Regs.

The operating division then decides whether or not to take administrative or judicial action against the target taxpayers. See 26 C.F.R. sec. 301.7623-4(d) Ex.1,

[7] The IRM does not carry the force of law and is not binding, but we can use it to show the Commissioner's interpretation and application of the Code and regulations to guide our own evaluation. Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533, 543 n.16 (2000).

Proced. & Admin. Regs. If the operating division declines to take administrative or judicial action, as is the case here, then the claim for award is returned to the WBO for disposition, either a rejection or denial of the claim. Id.; see also 26 C.F.R. sec. 301.7623-3(c)(8), Proced. & Admin. Regs.

Here, three 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." See Cooper v. Commissioner, 136 T.C. at 600. Second, we do not review an operating division's decision whether to audit a target taxpayer in response to a whistleblower claim; and third, we do not have the authority to require an operating division to explain its decision not to audit. See Lacey v. Commissioner, 153 T.C. ___, ___ (slip op. at 29-30) (Nov. 25, 2019). 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." Id. at 33. We have held that the language of section 7623 confers on us jurisdiction to review the WBO only. Id. at 30. Therefore, the question before us is whether the WBO abused its discretion in rejecting the Family Court claim, given that TEGE declined to take further action. We conclude that it has not.

C. The Contractors' Claims

In her unsworn declaration, Ms. Graf declared that all of the claims were forwarded to Ms. Germany at TEGE. And that Ms. Germany "surveyed [the] petitioner's claims."[8] The administrative record upholds that Ms. Germany surveyed the Family Court claim, but it is not clear that Ms. Germany surveyed the Contractors' claims. First, prior to sending the Family Court claim to TEGE, the WBO re-coded the Family Court claim as belonging to TEGE instead of SB/SE. The Contractors' claims remained coded as falling within the purview of SB/SE. Nothing in the administrative record evinces that SB/SE ever received or reviewed the claims. Second, the administrative record contains only one Form 11369. That Form 11369 concerns the Family Court claim only: the claim number on the form belongs to the Family Court claim and the only named target taxpayer on the form is the Family Court. Put simply, there is nothing on the Form 11369 that would indicate the form encompasses the Contractors' claims. Finally, Ms. Graf drafted

[8] The term "surveyed" refers to a revenue agent's decision, before the examination of a taxpayer's books and records, that an examination is unwarranted. See IRM pt. 4.10.2.5 (Feb. 11, 2016).

an Award Recommendation Memorandum based on the Form 11369 that she received from Ms. Germany. In that memorandum, she recommends that the Contractors' claims be denied based on the Family Court's Form 11369. The administrative record does not evince that the WBO, after making its initial determination, forwarded the Contractors' claims to an operating division. As we explained in supra part II, our review is limited to the administrative record at hand, unless an exception applies. See Kasper v. Commissioner, 150 T.C. at 20-24. The exception that applies here is that the WBO's actions as to the Contractors were not adequately explained by the administrative record put forth by the Commissioner. See id. We cannot properly review the WBO's actions if we do not have the complete administrative record before us, thus, summary judgment must be denied. See, e.g., Lacey v. Commissioner, 153 T.C. ___ (Nov. 25, 2019).

In conclusion, the WBO rejected the Family Court claim because TEGE reviewed the underlying legal issue and declined to proceed further. We conclude that this was not an abuse of discretion on the WBO's part; and respondent is entitled to a decision as a matter of law with respect to the Family Court claim. With respect to the Contractors' claims, respondent has not satisfied his burden of showing he is entitled to summary adjudication.

To reflect the foregoing,

ORDERED that respondent's motion for summary judgment with respect to the Family Court claim is granted. It is further

ORDERED that respondent's motion for summary judgement with respect to the Contractors' claims is denied, without prejudice. It is further

ORDERED and DECIDED that the determination made by respondent with respect to the Family Court claim in the final decision is sustained.

(Signed) Elizabeth A. Copeland
Judge

ENTERED: **JUL 06 2020**