

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

JAMES MARK FAORO, )  
 )  
 Petitioner, ) **ALS**  
 )  
 v. ) Docket No. 19299-18W  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent. )

**ORDER AND DECISION**

The petition in this section 7623<sup>1</sup> case, filed October 1, 2018, seeks review of three notices of determination issued to petitioner by respondent: (1) one for claim number 2018-008118, dated August 31, 2018, (2) one for claim numbers 2018-008119 and 2018-008120, dated August 31, 2018, and (3) one for claim number 2018-008830, dated August 31, 2018 (notices of determination).

This case is now before the Court on respondent's motion for summary judgment, filed April 22, 2019, and supplemented on August 12, 2019 (respondent's motion). In support of his motion, respondent relies upon declarations of Layne Carver and exhibits from respondent's Whistleblower Office (WBO) administrative file. Petitioner's objections to respondent's motion are embodied in his letter dated August 8, 2019, filed August 12, 2019, and his response, filed September 13, 2019.

**Background**

The undisputed facts relied upon by respondent in support of his motion are summarized in the following paragraphs.

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<sup>1</sup>Section references are to the Internal Revenue Code in effect for the relevant years.

Two Forms 211, Application for Award for Original Information, submitted to the WBO by petitioner resulted in respondent's issuance of the notices of determination. In those applications for awards, petitioner alleged that (1) the owner of a certain retail business who formerly employed him had paid wages in cash to a certain employee and failed to withhold and remit applicable employment taxes with respect to that employee for a number of tax years, and (2) the employee had failed to pay income taxes on those cash payments made to him by the retail business owner. With respect to the first whistleblower award application, the WBO assigned claim number 2018-008119 to the owner of the retail business and claim number 2018-008120 to the retail business. With respect to the second whistleblower award application, the WBO assigned claim number 2018-008118 to the employee and claim number 2018-008830 to the retail business.

Petitioner's claims were forwarded to a classifier in the Small Business/Self-Employed Unit (SBSE), who recommended that the claims first be forwarded to and considered by an employment tax classifier.<sup>2</sup> The employment tax classifier determined that (1) there were no employment tax issues with respect to the business owner or the employee, and (2) the employment tax allegations with respect to the retail business were not specific or credible, or were speculative.

Petitioner's claims were then returned to the SBSE classifier. After further consideration of petitioner's claims, the SBSE classifier recommended to the WBO that (1) the claims with respect to the business owner and the retail business be rejected because they were not specific or credible, or were speculative, and (2) the claim with respect to the employee be denied because the amount of income taxes in dispute for the tax years for which the statute of limitations on assessment remained open was below a certain threshold amount.

The notices of determination issued to petitioner relating to the business owner (claim number 2018-008119) and the retail business (claim numbers 2018-008120 and 2018-008830) each stated: "The claim has been rejected because the information provided was speculative and/or did not provide specific or credible information regarding tax underpayments or violations of internal revenue laws."

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<sup>2</sup>A classifier is an employee of an Internal Revenue Service operating division whose role is "to determine if the information on the Form 211 warrants further review." See Internal Revenue Manual at 25.2.1.3.1(2), "Roles and Responsibility of Classification".

The notice of determination relating to the employee (claim number 2018-008118) stated: “Under Internal Revenue Code section 7623, an award may be paid only if the information provided results in the collection of tax, penalties, interest, additions to tax, or additional amounts based on the information provided. In this case, the information you provided did not result in the collection of any proceeds. Therefore, you are not eligible for an award.”

### Respondent’s Motion and Petitioner’s Response

According to respondent, after giving due consideration to petitioner’s claims, respondent did not commence a judicial or administrative action on the basis of petitioner’s information and, therefore, did not collect any proceeds. That being so, according to respondent, he is entitled to decision as a matter of law.

According to petitioner, respondent committed numerous errors in considering and analyzing his whistleblower claims. Petitioner additionally states that he “would like a written explanation of the ‘sound judgement [sic], technical expertise, and professional knowledge and experience’ [that IRS personnel] employed to investigate the petitioner’s claims \* \* \*”. Petitioner does not, in his letter or response, dispute any of the facts relied upon by respondent.

### Discussion

Summary judgment serves to “expedite litigation and avoid unnecessary and expensive trials.” Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). A 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 the moving party carries its burden of proving no genuine dispute exists as to any material fact. Rule 121(a); Naftel v. Commissioner, 85 T.C. 527, 528-529 (1985). When the moving party has carried its burden, however, the party opposing the summary judgment motion must do more than simply show that “there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The adverse party must set forth specific facts, by affidavit or otherwise, showing that there is a genuine dispute for trial. Rules 121(d). See also Naftel v. Commissioner, 85 T.C. at 529.

Under section 7623, if certain statutory requirements are met, the Commissioner has authority to pay awards to whistleblowers who provide information relating to third-party taxpayers which results in the collection of

proceeds. A mandatory award under section 7623(b) is dependent upon “both the initiation of an administrative or judicial action and collection of tax proceeds.” Cooper v. Commissioner, 136 T.C. 597 (2011); Cohen v. Commissioner, 139 T.C. 299 (2012), aff’d per curiam, 550 F. App’x 10 (D.C. Cir. 2014).

Under section 7623(b)(4), this Court has jurisdiction to review the WBO’s determination regarding a whistleblower’s entitlement to a mandatory award, see Kasper v. Commissioner, 150 T.C. 8, 13 (2018), including the WBO’s determination to reject a claim for failing to meet certain threshold requirements, see Lacey v. Commissioner, 153 T.C. \_\_\_ (Nov. 25, 2019), or to deny a claim, see Cline v. Commissioner, T.C. Memo. 2020-35.<sup>3</sup> In reviewing the WBO’s determination, we are limited to review for an abuse of discretion on the basis of the administrative record at the time. See Kasper v. Commissioner, 150 T.C. at 20-23. An abuse of discretion exists when a determination is arbitrary, capricious, or without sound basis in fact or law. Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff’d 469 F.3d 27 (1<sup>st</sup> Cir. 2006). We cannot substitute our judgment for that of the WBO. Id. Furthermore, we are not empowered to “direct the Commissioner to commence an administrative or judicial action”. Cohen v. Commissioner, 139 T.C. at 302.

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<sup>3</sup>A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. 26 C.F.R. sec. 301.7623-3(c)(7). A claim may be rejected because it: (1) does not contain specific information, (2) does not contain credible information, (3) does not provide information that is believed will lead to collected proceeds, (4) does not report a failure to comply with the internal revenue laws, (5) does not identify the person believed to be in violation of the internal revenue laws, (6) does not provide substantive information, including supporting documentation, and (7) contains speculative information. 26 C.F.R. sec. 301.7623-1(c)(1), (4).

A denial is a determination that relates to or implicates taxpayer information. 26 C.F.R. sec. 301.7623-3(c)(8). The WBO’s denial of a claim indicates that “the IRS either did not proceed based on the information provided by the whistleblower \* \* \* or did not collect proceeds” as a result of proceeding against the taxpayer on the basis of the whistleblower’s information. Id. para. (c)(8). A denial is a determination that is made after the WBO engages in some substantive consideration of the claim. See Lacey v. Commissioner, 153 T.C. at \_\_\_ (slip op. at 26).

The administrative record in this case establishes that the WBO received petitioner's applications for award, evaluated petitioner's information, which included receiving input from two IRS classifiers, and based on the classifiers' recommendations determined that petitioner's information did not warrant further investigation by an IRS operating division. In doing so, the WBO evidently performed its evaluative function. See Alber v. Commissioner, T.C. Memo. 2020-20.

It matters not whether we share petitioner's concerns over respondent's reaction to the information petitioner provided in support of his claims, or whether we "appreciate petitioner's frustration that information that he believes is actionable was not pursued." Cohen v. Commissioner, 139 T.C. at 304. Petitioner has failed to show that the WBO's determinations in this case are arbitrary, capricious, or without sound basis in fact or law. That being so, there is no support for his claim that the WBO abused its discretion in declining to pursue petitioner's information. Consequently, in the absence of any dispute as to the actions respondent took in response to petitioner's claims for rewards, it follows that respondent is entitled to decision as a matter of law.

It follows, and is therefore

ORDERED that respondent's motion, as supplemented, is granted. It is further

ORDERED and DECIDED that the determination made in each of the notices of determination is sustained.

**(Signed) Lewis R. Carluzzo**  
**Special Trial Judge**

ENTERED: **MAY 07 2020**