

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

MARSHALL M. GOLDSTEIN,)	
)	
Petitioner,)	
)	
v.)	Docket No. 361-18W.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	
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)	
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ORDER OF DISMISSAL AND DECISION

This case is a whistleblower action commenced by petitioner pursuant to section 7623(b)(4).¹ Presently pending before the Court are two motions: (1) respondent’s Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, filed February 22, 2018, pursuant to Rule 40; and (2) petitioner’s Motion To Compel Production Of Documents, filed March 22, 2018, pursuant to Rule 104. Each party has filed an Objection to the granting of the other party’s motion. A hearing on the parties’ motions was held on May 23, 2018, in Chicago, Illinois, at which petitioner and his counsel appeared, as did counsel for respondent, but neither party chose to call any witnesses. Subsequent to the hearing respondent filed, at the Court’s direction, both a response and a supplemental response (with accompanying declaration) more fully explaining codes, abbreviations, and other aspects of respondent’s Exhibit A, which exhibit

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect at relevant times. All Rule references are to the Tax Court Rule of Practice and Procedure.

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was filed May 14, 2018, prior to the hearing. As will become apparent, such exhibit is central to the disposition of the parties' two pending motions.²

Background

The relevant facts are relatively straightforward and may be summarized as follows:

In or about December 2015 petitioner filed (or refiled) Form 211, Application For Award For Original Information, with respondent's Whistleblower Office. Petitioner's Form 211 alleged that the target taxpayer (hereinafter, target or taxpayer) did not qualify for tax exemption under section 501(c)(3), was subject to tax on unrelated business taxable income, and was subject to excise tax on excess benefit transactions. After review the Whistleblower Office referred the matter to the Examination Division of respondent's Tax Exempt/Government Entities Operating Division (hereinafter, TEGE). Thereafter TEGE commenced an examination of the target's taxable years 2013 and 2014. Specifically, TEGE examined both the target's Form 990, Return Of Organization Exempt From Income Tax, and its Form 990-T, Exempt Organization Business Income Tax Return.

TEGE never proposed any adjustments to the target's Form 990 or any change to the target's tax-exempt status. However, in or about March 2017 TEGE issued a 30-day letter, proposing both tax and penalty in substantial amounts for each of the two years that were examined. The proposed tax arose from adjustments made to the target's unrelated business taxable income on Form 990-T for 2013 and 2014. See secs. 511-513.

² Arguably, because Exhibit A could be viewed as matter outside the pleadings, respondent's motion to dismiss for failure to state a claim should be treated as one for summary judgment and dealt with accordingly. See Rule 40, final sentence. However, given that the parties have had every opportunity to respond to each other's motion, that a hearing was held, and that the outcome would be the same regardless, no useful purpose would be served in treating respondent's motion as one other than a motion to dismiss for failure to state a claim.

The target responded by appealing administratively to respondent's Office of Appeals. TEGE then forwarded the target's Form 990-T case to the Office of Appeals, along with the target's Form 990 as a "reference return" for informational purposes only.

Ultimately, insofar as the target's Form 990-T case was concerned, the Office of Appeals reversed TEGE in full, concluding that the target was not liable for either tax or penalty for 2013 and 2014.

In or about October 2017 the matter was returned to the Whistleblower Office. Based on the complete concession by the Office of Appeals and the lack of any collected proceeds, the Whistleblower Office determined that petitioner was not entitled to an award under section 7623. Thus, the first paragraph of its determination dated December 8, 2017, stated as follows:

We have considered your application for an award dated 12/18/2015. 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.

In response, petitioner timely commenced the present action in this Court on January 5, 2018. Thereafter, the parties' two aforementioned motions followed.

Notably, both respondent's motion to dismiss for failure to state a claim and petitioner's motion to compel production focus on respondent's aforementioned Exhibit A. That exhibit is a redacted copy of an Appeals Transmittal And Case Memo, dated October 23, 2017, that respondent relies on to demonstrate that no collected proceeds were received by virtue of the information provided by petitioner in his December 2015 Form 211.

The Appeals Transmittal And Case Memo is signed both by the Appeals officer who considered the taxpayer's administrative appeal of TEGE's aforementioned 30-day letter and by the Appeals officer's Appeals Team Manager. The Appeals Transmittal And Case Memo clearly identifies the following: the identity of the taxpayer; 2013 and 2014 as the two years that were examined; the amount of tax and penalty that were proposed by TEGE for each such year; and the amount of tax and penalty for each such year as revised by the Office of Appeals,

i.e., "\$0.00" tax and "\$0.00" penalty for each such year. The Appeals Transmittal And Case Memo also shows that the case was conceded by Appeals "based on hazards of litigation" and that the case was then closed by the Office of Appeals as an "agreed case", i.e., agreed by the Office of Appeals and the taxpayer. Although TEGE might not have agreed with the disposition of the case by the Office of Appeals, the taxpayer's successful administrative appeal to the Office of Appeals ended the matter within the Internal Revenue Service.

The Appeals Case Memorandum, which was authored by the Appeals officer and is part of the Appeals Transmittal And Case Memo, includes the following statements:

SUMMARY AND RECOMMENDATION

Whether the activities carried out by [the target] that were previously conducted by the [governmental unit] are lessening the burdens of the government and thus income from such sources is not subject to unrelated business income (UBI) tax.

Yes, in my opinion. * * * Therefore, I recommend Appeals concede the issues raised by Exam.

* * * * *

MY EVALUATION

* * * * *

I believe there are greater hazards of litigation to Exam's case if this case proceeds to the court of law. In my opinion, * * * therefore, I recommend Appeals concede the issues.

As the Appeals Transmittal And Case Memo demonstrates, the Appeals officer's evaluation and recommendation of full concession by respondent of the tax and penalty proposed by TEGE was approved by the Appeals Team Manager, and the case was then closed by the Office of Appeals on an agreed basis.

Petitioner's motion to compel production seeks to obtain an unredacted copy of the Appeals Transmittal And Case Memo.³ Thus, on the Schedule of Adjustments that is a part of the Appeals Transmittal And Case Memo the description of the adjustments examined for 2013 and 2014 has been redacted, although the dollar amounts of TEGE's adjustments and changes made by the Office of Appeals are not redacted. But of much greater concern to petitioner is the fact that most of the portion of that document that was authored by the Appeals officer, i.e., the Appeals Case Memorandum, is redacted. Thus, all of the section entitled "BRIEF BACKGROUND" is redacted, as is the portion under "DISCUSSION AND ANALYSIS" that is devoted to "Exam's Position". Although most of the portion under "DISCUSSION AND ANALYSIS" that is devoted to "Law and Legal Analysis" is not redacted, a substantial portion is. Further, most of the portion under "MY EVALUATION" is redacted, as is most of the portion under the introductory heading "SUMMARY AND RECOMMENDATION".

Discussion

In a whistleblower action under section 7623, the Court has jurisdiction only with respect to the Commissioner's award determination. Cohen v. Commissioner, 139 T.C. 299, 302 (2012), aff'd without published opinion, 550 Fed. App'x. 10 (D.C. Cir. 2014), cert. denied 134 Sup. Ct. 2890 (2014). The Court's jurisdiction does not contemplate review of the Commissioner's determination of the alleged tax liability to which the claim pertains. Id.

It is axiomatic that any award provided for by section 7623 must be paid from collected proceeds. Sec. 301.7623-1(a), Proced. & Admin. Regs. The term "collected proceeds" is defined to include "tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided [by the whistleblower]". Sec. 301.7623-2(d)(1), Proced. & Admin. Regs.; e.g., Cooper v. Commissioner, 136 T.C. 597, 600 (2011) ("a whistleblower award is dependent upon *both* the initiation of an administrative or judicial action *and* collection of tax proceeds"); see Whistleblower 16158-14W v. Commissioner, 148 T.C. __, __ (Apr. 17, 2017).

³ It should be noted that an unredacted copy of this document has not been made available to the Court.

In the present case, by virtue of the information provided by petitioner respondent commenced an administrative action in the form of an examination by TEGE of two taxable years of the target. And although TEGE did propose tax and penalty for each of those years in its 30-day letter, respondent's Office of Appeals ultimately conceded the case in full and closed it. Such disposition ended the matter. The Court therefore agrees with respondent that there were no collected proceeds.

Petitioner contends that respondent may be hiding information and that the production of certain documents, specifically an unredacted copy of the Appeals Transmittal And Case Memorandum, would "provide transparency" as to whether there was "no collection" of proceeds. In that regard petitioner cites and relies on Whistleblower 11099-13W v. Commissioner, 147 T.C. 110 (2016), and Whistleblower 10683-13W v. Commissioner, 145 T.C. 204 (2015), as instances of where the Court granted the whistleblowers' motions to compel production of documents. As discussed *infra*, the key factor in both cases was that the Commissioner had collected proceeds, and thus discovery was necessary to decide whether those proceeds were attributable to the information that the whistleblowers had provided.

In Whistleblower 11099-13W v. Commissioner, the whistleblower informed respondent about a tax evasion scheme carried out by a corporation and its affiliates (target) that the whistleblower claimed had led to the collection of proceeds, as well as to an increase to the target's future tax bills. The whistleblower sought documents to show that it was his information that led to the collection of proceeds. Respondent claimed that the documents that the whistleblower sought were not relevant and that the documents did not deal with the tax evasion scheme. The Court held that although the whistleblower's interpretation of "collection of proceeds" was broad, there was at least a minimal showing of relevance and that respondent had not met his burden to deny production.

Similarly, in Whistleblower 10683-13W v. Commissioner, the whistleblowers filed a claim with the Commissioner in which they informed him of a tax evasion scheme carried out by a specific target corporation. In response to a subsequent discovery request by the whistleblowers that was resisted by the Commissioner, the Court concluded that the Commissioner's relevancy objection was based on a generalized view that the scope of review was limited to the administrative record of the Whistleblower Office and that the information that the whistleblowers sought was outside such record and therefore not discoverable.

The Court held that the information that the whistleblowers sought was relevant because they were seeking evidence that would prove that the collection of proceeds from the target was attributable to the information that they had provided.

In the present case no proceeds were collected. The two aforementioned cases are distinguishable on that basis, and petitioner's reliance on them is therefore misplaced.

Petitioner also argues that discovery is warranted because the information he provided may possibly lead to, somehow or sometime in the future, collected proceeds. Such argument strikes the Court as too speculative to warrant the granting of petitioner's motion. Nor will the Court presume that the redaction of the Appeals Transmittal And Case Memo represents anything other than respondent's good faith effort to comply with his view regarding limitations affecting the disclosure of confidential taxpayer returns and return information as prescribed by section 6103(h)(4). After all, the unredacted portions of the Appeals Transmittal And Case Memo make clear that the Office of Appeals conceded in full the tax and penalty proposed by TEGE based on hazards of litigation, and such concession negates the possibility of collected proceeds. Whether the concession by the Office of Appeals was warranted is not a matter over which the Court has jurisdiction in this whistleblower case. Cohen v. Commissioner, 139 T.C. at 302. In short, it is enough to know that the Office of Appeals fully conceded the case and then closed it; *why* it did so is not properly a subject for inquiry.

Conclusion

In view of the foregoing, it is hereby

ORDERED that petitioner's Motion To Compel Production Of Documents, filed March 22, 2018, is denied. It is further

ORDERED that respondent's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, filed February 22, 2018, is granted. It is further

ORDERED AND DECIDED that the determination of the Whistleblower Office dated December 8, 2017, denying petitioner an award under section 7623 is sustained.

**(Signed) Robert N. Armen
Special Trial Judge**

ENTERED AUG 14 2018